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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 299.

ELIAS BLOCK AND SONS, PLAINTIFFS IN ERROR,

vs.

ANDREW W. DARLING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED NOVEMBER 19, 1887.

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1 UNITED STATES OF AMERICA, } ss:
District of Kentucky, }

The President of the United States of America to the judge of the circuit court of the United States for the Kentucky district, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Andrew W. Darling, plaintiffs, and Elias Block and Sons, defendants, a manifest error hath happened, to the great damage of the said Elias Block and Sons, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first day of our next October term, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said court, at Covington, in said district, this ninth day of June, A. D. 1887, and of the Independence of the United States the 111th year.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

JOS. C. FINNELL,
C. C. C., K. D.

Allowed by—
HOWELL E. JACKSON,
U. S. Circuit Judge, 6th Judicial Circuit.

Come to hand July 1st, 1887. Executed July 9th, 1887, on Jos. C. Finnell, clerk of U. S. circuit court at Covington, Ky., by delivering to him a copy of the within.

A. J. GROSS, *U. S. M.*,
By B. F. WARNOCK, *D. M.*

Marshal fees, to serv. 1 copy, 2.00.

2 UNITED STATES OF AMERICA, } ss:
District of Kentucky, }

To Andrew W. Darling, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at Washington on the first day of its next October term, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the

said district of Kentucky, wherein Elias Block and Sons are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Seal 6th Circuit Court, Ky. Dis., U. S. of America.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this ninth day of June, in the year of our Lord 1887, and of our Independence the 111th year.

HOWELL E. JACKSON,
Circuit Judge.

Come to hand July 1st, 1887. Executed July 7th, 1887, on Andrew W. Darling by delivering to him a copy hereof at Carrollton, Ky.

A. J. GROSS, *U. S. M.*,
By B. F. WARNOCK, *D. M.*

1887. Marshal fees.

July 7th, 1887.	To serv. 1 copy	2 00
	Expense in lieu of milage.	
" 7.	To R. R. fare to Worthville, 1.85; hack fare to Carrollton, 1.00	2 85
7.	Hotell at Carrollton, 1.50; s't car & toll, 20c.	1 70
8.	Hack fare to Worthville, 1.00; R. R. to Covington, 1.85	2 85
		$9 40

3 Proceedings of the circuit court of the United States for the sixth judicial circuit and district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Covington, on Monday, December 6th, A. D. 1886, and of our Independence the 111th year.

Present: Hon. Howell E. Jackson, circuit judge.

ANDREW W. DARLING
against
ELIAS BLOCK AND SONS.

Be it remembered that heretofore, to wit, on the 1st day of December, A. D. 1884, came the defendants, Elias Block and Sons, by their attorney, and on their motion the following order was entered herein, viz:

A. W. DARLING
vs.
ELIAS BLOCK AND SONS.

On motion of Jacob Schroder, attorney for Elias Block and Sons, a transcript of proceedings had herein in the Carroll circuit court was ordered to be filed.

The transcript mentioned in the foregoing order was in words and figures as follows, viz:

4 Carroll Circuit Court. September Term, Sep. 4th, 1884.

A. W. DARLING, Plaintiff,
vs.
ELIAS BLOCK & SONS, Defendants.

Pleas begun and held before the Hon. P. N. Major, sole judge of the Carroll circuit court in and for the county of Carroll, State of Kentucky, at which the following proceedings were had, viz:

Be it remembered that heretofore, to wit, on the 22nd day of July, 1884, the plaintiff in the above-styled action filed a petition in the office of the clerk of the Carroll circuit court, which is in words & figures to wit:

Carroll Circuit Court.

ANDREW W. DARLING, Plaintiff,
against
ELIAS BLOCK, L. T. BLOCK, J. MACK, SAMUEL BLOCK, and JOSEPH BLOCK, Partners under the Name of Elias Block and Sons, Defendants.

The plaintiff, Andrew W. Darling, says that the defendants, Elias Block, L. T. Block, J. Mack, Samuel Block, and Joseph Block, were, in the year 1882 and afterward, partners doing business in the firm name and style of Elias Block and Sons, and that said Block and Sons and that the said defendants are indebted to him in the
5 sum of seventy-one hundred and forty-four $\frac{37}{100}$ dollars for and on account of money deposited with them by plaintiff and *excepted* and received by def'ts to be paid to pl'ff on his order, and for ground corn and rye, coal & rock, two mules & two carts & one dray and eight wheelbarrows and bands and 200 seamless sacks and 3 weighing scales and one money safe and two desks sold and delivered by this plaintiff to the defendants at their special instance and request, particulars of which are set out in an account filed herewith as part hereof, marked "A," and for each and all of which said items the defendants promised and agreed to pay plaintiff, but no part of which has been paid except three thousand one hundred and three dollars, which was paid by def'ts in various small amounts and for which defendants hold vouchers.

Wherefore plaintiff prays judgment against defendants for the balance and sum of four thousand and forty-one $\frac{37}{100}$ dollars, with interest, and for his costs *and for his costs* and for all proper relief.

By H. M. WINSLOW AND
FISHER & MONTFORT,
His Att'ys.

STATE OF KENTUCKY, } sct:
Carroll County, }

Andrew W. Darling says the statements in the foregoing petition are true.

Sworn to before me by A. W. Darling — day ——, 188–.

—— ——.

6 "A."

The exhibit marked "A" and found in the foregoing petition is in words & figures as follows, to wit:

Mrses. Elias Block & Sons to A. W. Darling, Dr.

1882.

To money deposited	$5,636 00
84 bus. ground corn @ 70	58 80
10 " " rye " 1.15	11 50
40 " malt	100 00
88 sacks of corn—199.40 bus.	146 48
12 " rye	39 39
7,500 bus. coal, 6½	487 50
150 perch rock	150 00
2 mules	300 00
2 carts	40 00
1 dray, new	40 00
8 wheelbarrows	40 00
5 sample bands	9 70
200 seamless sacks	40 00
3 pair scales	30 00
1 money safe	10 00
1 desk	15 00
	$7,144 37

Credits.

By cash at different & in various amounts	3,103 00
	$4,041 37

Order in court September term, 1884, is in words and figures to wit:

Carroll Circuit Court.

A. W. DARLING, Plaintiff,
vs.
7 ELIAS BLOCK, &c., Defendants.

Came the defendant L. T. Block and filed his petition, duly verified, and also filed with said petition a bond, with Frank Bates and John Howe, securities, for his entering into the circuit court of the United States for the district of Kentucky on the 1st day of its next

session a copy of the record in this suit and for paying all costs that may be ordered by said circuit court, if said court should hold that this suit was wrongfully or improperly removed thereto, and for paying the plaintiff all damages he may sustain if the said Block should fail to file said record in said circuit court or pay all costs that may be awarded if said court should hold that this cause was improperly or wrongfully removed thereto, and moved the court for an order transferring and removing this cause to the circuit court of the United States for the district of Kentucky, and the court took time.

The petition referred to in the foregoing order is in words and figures to wit:

Petition of L. T. Block to Remove This Cause to United States Circuit Court for the District of Kentucky.

Carroll Circuit Court.

A. W. DARLING, Plaintiff,
vs.
ELIAS BLOCK, L. T. BLOCK, J. MACK, and JOSEPH BLOCK, Defendants.

8 Your petitioner, who is a defendant to this suit, states that he is not now nor was at the commencement of this action a citizen of the State of Kentucky, and that neither of his codefendants, Elias Block, J. Mack, Samuel Block, or Joseph Block, are citizens of the State of Kentucky nor was at the commencement of this action. He says that this defendant, as well as all his codefendants, are now citizens of the State of Ohio and residents of the city of Cincinnati and were at the commencement of this action, and he says that the pl'ff, A. W. Darling, now and was at the commencement of this action a citizen of Kentucky and resides in Carrollton, Carroll county, Kentucky, and that the matter in dispute in this action, exclusive of costs, exceeds the sum of five hundred dollars; that the matter in dispute in this action is the sum of four thousand and forty-one $\frac{37}{100}$ dollars; and he further states, the plaintiff, who brings this suit, being a resident and citizen of the State of Kentucky and was so at the commencement of this action, and all the defendants being residents and citizens of the State of Ohio and were so at the commencement of this action, this is a controversy wholly between citizens of different States, and this defendant states and insists that under an act of the forty-third Congress of the United States of America approved March 3rd, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," chap. 137, page 470, Statutes
9 of the United States of America, he is entitled to have this suit removed from this court to the circuit court of the United States *to* the district of Kentucky, to be held in this district, where the suit is pending; said court is held at Covington, Ky., in this

district, and he also makes and files herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for all costs that may be awarded by said circuit court if said court should hold that this suit was wrongfully or improperly removed thereto; which said bond is filed herewith as part hereof, marked "A."

Wherefore the defendant L. T. Block prays for the removal of this cause from this court to the circuit court of the United States for the district of Kentucky and for all orders proper and necessary thereto.

MASTERSON & GAUNT,
Att'ys for L. T. Block.

L. T. Block says the statements contained in this petition are true.
LEWIS T. BLOCK.

Sworn to before me by L. T. Block this 1st day of Sept., 1884.
F. M. GORMAN,
Notary Public, Ham. Co., Ohio.

The bond referred to in the foregoing petition of L. T. Block is in words and figures to wit:

10 Carroll Circuit Court.

A. W. DARLING, Plaintiff,
vs.
ELIAS BLOCK, L. T. BLOCK, SAMUEL BLOCK, J. MACK, JOSEPH BLOCK, Defendants. } Bond.

We, L. T. Block, principal, and Frank Bates and John Howe, security, do hereby firmly hold and bind ourselves unto the plaintiff, Andrew W. Darling, that the said L. T. Block will, at the next session of the circuit court of the United States for the district of Kentucky, held at Covington, in said district, and on the first day of said term, enter in said circuit court a full, perfect, and complete record of the suit of A. W. Darling, plaintiff, ag'st Elias Block, L. T. Block, J. Mack, Samuel Block, and Joseph Block, defendants, now pending in Carroll circuit court, and that the said L. T. Block will pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, and that said L. T. Block will well and truly pay to the said A. W. Darling all damages that he may sustain by the failure of Block to file said record in said circuit court of the United States or to pay all costs that may be awarded by said court.

Witness our hands and seals this 4th day of September, 1884.

LEWIS T. BLOCK. [SEAL.]
FRANK BATES. [SEAL.]
JOHN HOWE. [SEAL.]

Attest: JOHN S. GAUNT.
JOHN M. SMITH.

11 Order in court September 8th, 1884, is in the following words and figures, to wit:

Carroll Circuit Court.

A. W. DARLING, Plaintiff,
vs.
ELIAS BLOCK & SONS, Defendants.

The court now being sufficiently advised, the motion of the defendant L. T. Block to remove this cause to the United States circuit court for the district of Kentucky is now sustained, and it is ordered that this cause be transferred and removed to said circuit court of the United States, and the clerk of this court will make out and deliver to the said L. T. Block a complete and perfect record of the papers and proceedings in this cause, to be filed by him in said circuit court; to all of which the plaintiff excepted, but the exceptions were overruled, and the plaintiff excepted to said ruling.

The summons ordinary that was issued on the filing of plaintiff's petition should have been copied after the petition, but is copied here, which is in words and figures as follows:

The Commonwealth of Kentucky to the sheriff, jailer, or any constable of Carroll county, Greeting:

You are commanded to summon Elias Block, L. T. Block, J. Mack, Joseph Block, and Samuel Block to answer, on the 1st day of the next Sept. term of the Carroll circuit court, a petition filed
12 against them in said court by A. W. Darling, and warn them that upon their failure to answer the petition will be taken for confessed or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next September term of this court.

Witness W. O. Gullion, clerk of the Carroll circuit court, this 22nd day of July, 1884.

W. O. GULLION.

Sheriff's return on the foregoing summons was as follows:

"Executed by delivering to the within-named L. T. Block a true copy of the within summons this — day of ——, 1884.

D. M. BRIDGES, *S. C. C.*"

STATE OF KENTUCKY, *Carroll County,* } *sct:*

I, W. O. Gullion, clerk of the Carroll circuit court, do hereby certify that the foregoing 13 pages is a complete and perfect record and transcript of all the pleadings, orders, and proceedings in the suit of A. W. Darling ag'st Elias Block & Sons, lately pending in the Carroll circuit court, State of Kentucky.

Given under my hand and seal of office this Oct. 6, 1884.

[SEAL.]

W. O. GULLION,
Clerk Carroll Circuit Court.

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And on a day following, to wit, on the 2nd day of December, A. D. 1884, came the plaintiff and filed his written motion herein. Said motion is in words and figures as follows, viz:

Circuit Court of the United States for the District of Kentucky.

A. W. DARLING, Plaintiff,
vs.
ELIAS BLOCK, &c., Defendants.

And now comes the plaintiff, A. W. Darling, and moves the court to remand this case to the circuit court for Carroll county, Kentucky, where the same was originally instituted, upon the following grounds and for the following reasons:

1st. Because at the time of filing the petition for removal in the Carroll circuit court the summons or process had not been executed on Elias Block, J. Mack, Joseph Block, Samuel Block, who were defendants to the plaintiff's petition, nor was there any return by the sheriff as to them, nor did they enter their appearance in the case. The appearance was by L. T. Block alone, and the case could not be tried at the term of the Carroll circuit court at which the motion was made, the action being a joint one against all the defendants.

14 2nd. The petitioner, L. T. Block, did not make and file the bond required by law with his petition for removal, the bond copied in the record being executed, if executed at all, out of court, and attested or purporting to be attested by witnesses, and there being no proof — its execution.

3. The sureties were not approved by the court or clerk.

4th. The bond does not show, nor is it shown elsewhere, that the sureties are citizens of the State of Kentucky.

5th. The bond was not executed in or before the court or the clerk, & not being approved by either the clerk or court the bond for that reason is not valid, or, if so, there is nothing to show that the sureties are solvent, good, and sufficient.

6th. There was no proof that the sureties ever executed the bond.

GEO. R. McKEE, *For Pl'ff.*

And on the third day of December, A. D. 1884, the following order — entered herein, viz:

A. W. DARLING
vs.
ELIAS BLOCK & SONS.

This cause being heard on motion of plaintiff, by counsel, Geo. R. McKee, Esq., to remand to State court for trial, the court now being fully advised, it is ordered that said motion be and the same
15 is overruled, and the clerk is directed to place this cause on the docket in its regular order.

And on the 9th day of December, A. D. 1884, the following order was entered herein, viz:

A. W. DARLING
vs.
ELIAS BLOCK & SONS.

On motion of plaintiff, by his attorney, Geo. R. McKee, Esq., it is ordered that defendants have sixty (60) days in which to file answer herein; that plaintiff have thirty (30) days thereafter in which to file reply, and that twenty days additional be given to either to file such other or further pleadings as may be necessary.

And on the 7th day of February, A. D. 1885, the answer, counter-claim, and set-off of Louis T. Block was filed herein; said answer, &c., is in words and figures as follows, viz:

United States Circuit Court for District of Kentucky.

ANDREW W. DARLING, Plaintiff,
vs.
ELIAS BLOCK *et al.*, Defendants.
} Answer, Counter-Claim, & Set-Off of L. T. Block.

The defendant Louis T. Block for his answer herein denies that the defendants, Elias Block, L. T. Block, J. Mack, Samuel
16 Block, and Joseph Block, were in the year 1882 and afterwards or at any time partners doing business in the firm name and style of Elias Block & Sons, or that the said defendants are indebted to the plaintiff, Andrew W. Darling, in the sum of seventy-one hundred and forty-five and $\frac{37}{100}$ dollars or any sum whatever for and on account of money deposited with them by plaintiff and accepted and received by defendants to be paid to plaintiff on his order, or for ground corn or ground rye or malt or corn or rye or coal or rock or two mules or two carts or one dray or eight wheelbarrows or five barrels or two hundred seamless sacks or three weighing scales or one money safe or two desks, or on any account or for any purpose whatever.

He denies that these defendants ever received from the said plaintiff the sum of $5,636,00 or any other sum of money deposited by plaintiff and accepted or received by defendants to be paid to plaintiff or his order, denying that he ever at any time or for any purpose whatever deposited with these defendants any sum whatsoever, denying that these defendants ever purchased from said plaintiff

84 bushels of ground corn, or any number of bushels, at 70 cents per bushel; or ten bushels of ground rye, or any number of bushels, at $1.15 per bushel; or 88 sacks of corn, or any number of sacks of corn, at $146.48; or 12 bushels of rye, or any number of bushels of rye, at $29.39; or 7,500 bushels coal at 6½c. per bushel, or any number of bushels at 6½c. per bushel; or 2 mules, or any number of mules, at $300; or 2 carts, or any number of carts, at $40.00;
17 or one dray, $40.00; or 8 wheelbarrows, $40.00, or any number of wheelbarrows at $40.00; or 5 sample barrels, or any number of barrels, at $9.70. Defendant says that this defendant, together with Elias Block, Edward J. Mack, and Samuel Block, composing the firm of Elias Block and Sons, purchased in March, 1882, from the plaintiff, Andrew W. Darling, the following articles at the original price- hereinafter set out and no more, and that they have fully paid him at the time of said purchase, to wit, 8th day of March, 1882, said articles so purchased and the prices *was* as follows:

84 bushels ground corn, @ 68½c.	$57 54
10 " " rye, @ 1.00	10 00
40 bags malt, 100 bush., @ 1.00	100 00
88 " corn, 176 " @ 68½	120 56
12 " rye, 24 " @ 1.00	24 00
7,500 bush. coal, slack, @ 4c.	300 00
150 perch rock, @ 1.00	150 00
2 mules	200 00
2 carts	30 00
1 dray	30 00
8 wheelbarrows	8 00
5 sample barrels, empty	9 50
200 seamless sacks, 20c. each	40 00
Amounting in all to	$1,079 60

Which said amount was paid to and received by said plaintiff, Andrew W. Darling, at said time, and defendant supposes that these items are the same set out in plaintiff's account filed with his petition and all which has been fully paid him.

Defendant denies that either he or said Elias Block & Sons
18 ever at any time promised or agreed to pay the plaintiff for the several items of the account filed with the petition set out by plaintiff, but says that said articles were purchased by said Elias Block & Sons and paid for as herein set out and not otherwise.

2. This defendant, for further answer and counter-claim herein, says that this defendant, together with Elias Block, Edward J. Mack, and Samuel Block, comprised at and ever since the time hereinbefore referred to the copartnership of Elias Block & Sons, and that at the time of the purchase of the articles mentioned in plaintiff's petition and up until March 8th, 1882, the plaintiff was operating a distillery at Prestonville, Kentucky, known as the A. W. Darling distillery, and was the owner of the distillery premises and all the improvements thereon, together with the articles mentioned in his said account and which were then and there on said premises and

being used by him in running and operating said distillery; that said plaintiff was then and there making a whisky that was by him represented as made of good and sound material, not rotten nor musty, and represented as being a good, sound, and merchantable whisky, not musty, and which whisky by the name and brand of A. W. Darling and H. J. Whitehead was reputed to the trade and public to possess said good qualities; and that on and between April 1st, 1881, and March 8, 1882, for value received, sold and delivered to said Elias Block & Sons in his warehouse at Prestonville certain A. W. Darling whiskies, described in Exhibit A, made part hereof, which the said plaintiff knew were bought for pur-
19 pose of resale, and at the time of the sale of said whiskies it was agreed that the same was of the qualities and made of the material of the qualities hereinbefore described; that this defendant nor any of the said firm of Elias Block & Sons knew otherwise, and being ignorant of the facts hereinafter set forth paid said plaintiff therefor the sum of $——; that thereafter the said whisky was sold by them as sound, merchantable, and not musty at the sum of $——; subsequently said whisky was discovered to be unsound, unmerchantable, and musty and was returned to said Elias Block & Sons and was left on their hands as altogether useless for purposes of sale, and that said whisky was not made out of good material and was not sound, merchantable whisky at the time sold by said Darling to said Elias Block & Sons, but was made out of rotten material and was unsound and not merchantable, all which was known to said Darling at said time; and by reason of the facts said defendants were damaged and injured in the sum of $1,964\frac{85}{100}$.

Defendant says that said Elias Block & Sons have often requested plaintiff to pay said sum, but he has failed and refused to do so, and that the alleged claim of plaintiff for money deposited and which defendant denies to be owing to plaintiff by these defendants, and also the whole account sued on by plaintiff, originated in the purchase of said distillery premises and other property from plaintiff, being the alleged balance found after deducting from the purchase prices the claims and demands of said Elias Block & Sons
20 against the plaintiff arising out of the transactions of which the making and purchase of said whiskies formed a part; and that by reason of said Darling's concealment of the musty and unsound character of said whiskies the said balance was too large by the said sum of $1,964.85. Said Darling is wholly insolvent and no judgment against him can be satisfied of his goods, chattels, or other kind of property whatever.

3. This defendant, for further answer and counter-claim, says that at and ever since the time hereinbefore referred to, to wit, March 8, 1882, he, together with Elias Block, Edward J. Mack, and Samuel Block, were copartners as Elias Block & Sons, and that on March 8, 1882, said plaintiff sold to said Elias Block, for benefit of Elias Block & Sons, the plaintiff's distillery premises, at Prestonville, Kentucky, together with all property thereon, and his distillery business, which he was then conducting thereon, together with all the good will, brands, trade-marks, trade names, and other tokens con-

nected with and belonging to said business and distillery, and whiskies then made, for the sum of $20,450.82, and that said sum was paid therefor, and that the sum alleged by plaintiff as deposited with defendants formed part of said sum of $20,450.82; that the whiskies made by plaintiff at said distillery up to said date were represented by him and known to the public and trade as good, sound, merchantable, and not musty whiskies, and that said whisky, by his said trade-marks and names, were known by the public and
21 trade as made at said distillery, and that the good reputation of — there made was because of its being sound, merchantable, and not musty, and the said trade marks and names were valuable by reason thereof, and that the good will attached to said distillery and its operations and business accrued materially and mainly from the said reputation of the said whisky there made; that at said time said plaintiff had made and warehoused for the purpose of selling and disposing to the public and trade a large quantity of whisky of said trade mark and name, the amount of which defendant is now unable to specify more particularly, but which *are* partially set out in Exhibit "A," filed with this answer, which whisky was not made out of good material and was unsound and musty and not merchantable, and that plaintiff knew such to be the fact, but wrongfully concealed said facts from said defendant and all said firm of Elias Block & Sons; that said defective and inferior condition of said whisky impaired and injured the reputation of said whisky, known, as aforesaid, by its brand and trade-mark to be made at said distillery, and thereby injured said trade-mark and the reputation and good will of the business and distillery to the extent of $7,000.00; that but for said reputation, good will and trade-mark, and good name of the whiskies there made the property purchased as aforesaid was worth $7,000.00 less than was paid for same; that by such injury and impairment of the value of said property there was a failure to the extent of $8,964.85 of the consideration
22 for which said money was paid. The defendant says that the plaintiff is wholly insolvent, and that no judgment can be made out of him.

Wherefore the defendant makes this his answer and counter-claim against the plaintiff, and prays judgment against him for the sum of $—, for costs, and for all proper relief.

J. SHRODER,
HALLAM, MASTERSON & GAUNT,
For Defendant.

STATE OF OHIO, *Hamilton County,* } ss:

Louis T. Block says he believes the statements contained in this answer and counter-claim are true.

LOUIS T. BLOCK.

Sworn to before me and subscribed in my presence by Louis T. Block this sixth day of February, 1885.

[SEAL.] HENRY C. OETTINGER,
Notary Public, Hamilton Co., Ohio.

And on the 7th day of March, A. D. 1885, the plaintiff filed his demurrers to the counter-claim, &c., of def't L. T. Block; which said demurrers are in words & figures as follows, viz:

United States Circuit Court for the District of Kentucky.

ANDREW W. DARLING, Plaintiff, *against* ELIAS BLOCK & SONS, Defendants. } Demurrer to Ans. & Counter-Claim, &c.

The plaintiff, A. W. Darling, comes and demurs to so much
23 of the answer filed by defendant Block as sets up a counter-claim for $1,964.85, commencing on the 4th page with the words "the defendant, for further answer and counter-claim," and ending on the 6th page with the words "chattels or other kind of property whatever," because he says—

1. That the matters therein set forth do not constitute a sufficient defense to plaintiff's action.

2. Because the matters therein set forth are insufficient to support a defense to plaintiff's action, and plaintiff, by reason of the matters contained in the same as therein set forth, is not barred or precluded from maintaining his action aforesaid.

Wherefore he prays that so much of the defendants' counter-claim as sets up the $1,964.85 be dismissed.

And the plaintiff comes and demurs to so much of the defendant Block's answer and counter-claim as is contained commencing on the 6th page thereof with the words "and this defendant, for further answer and counter-claim," and ending on the 9th page with the words "and prays judgment against him for the sum of $8,964.85," because he says—

1. That the matters therein do not constitute a sufficient defense to plaintiff's action, and because—

2. The matters therein set forth are insufficient to support a defense to plaintiff's action.

And plaintiff, by reason of the matters contained, as the same are therein set forth, is not barred or precluded from maintaining his action aforesaid.

24 Wherefore he prays that so much of the defendants' counter-claim as sets up and asks judgment for the sum of $8,964.85 be dismissed.

WINSLOW & WINSLOW,
McKEE & FINNELL,
Att'ys for Plaintiff.

And on March 7th, 1885, the plaintiff's reply to the answer & counter-claim of Louis T. Block was filed herein. Said reply is in words and figures as follows:

United States Circuit Court for the District of Kentucky.

ANDREW W. DARLING, Plaintiff,
against
ELIAS BLOCK & SONS, Defendant-. } Reply to Ans. & Counter-Claim of L. T. Block.

The plaintiff, Andrew W. Darling, for reply to the answer and counter-claim of the defendant Louis T. Block, says his information as to the persons who composed the firm of Elias Block & Sons at the time of the transactions set forth in his petition was derived from the defendants, and he has no other means of knowing. He admits that in March, 1882, the said firm was composed of Elias Block, Louis T. Block, Edward J. Mack, and Samuel Block. He denies that in March, 1882, the said firm bought of him ground corn, ground rye, malt, corn, rye, coal slack, rock, 2 mules, 2 carts, 1 dray, wheelbarrows, sample barrels, and seamless sacks, in the numbers and quantities and at the prices and for the sum total of one thousand and seventy-nine $\frac{60}{100}$ —, as set out in said def't's answer and counter-claim; but he says again the articles purchased
25 by said firm of him were the same and at the same time and for the prices and in the number and quantities set out in his petition, and not otherwise.

And he denies that the defendants or either of them or any one for them or either of them ever did, either at the time of purchasing said articles or at any other time, pay to this plaintiff one thousand and seventy-nine $\frac{60}{100}$ dollars or any other amount for said articles or any of them, and he denies that said property has ever been paid for, and he says that none of the moneys paid to him, as set out in his petition and account, filed therewith, were paid for said articles, but said amounts were paid on the whole indebtedness.

He denies that he ever made or uttered in any way any representations to the defendant- or to either of them or to any person that the whiskies made by him at said distillery were sound or pure or not musty or were good merchantable whiskies, or made any representation whatever about said whiskies. He says he was operating said distillery at said time, as stated in the defendant's answer, but he says that at and before and during said times he was running and operating said distillery under and in compliance with a contract before then made between him and the said firm of Elias Block & Sons, which continued in force until the sale by him of his distillery to def'ts, to wit, 8th March, 1882, and by the terms of which this plaintiff was to deliver to the said firm all the whiskies and other liquors made at and in said distillery, and he says they did receive and accept all the whiskies made
26 by him. He says he made no representation whatever as to the qualities of or the manner of making said whiskies, and that the defendants asked for no representations about the same, and he says that they knew as much and more about said whiskies than plaintiff, and he denies that the defendants or either of them ever demanded of him or requested him to pay to them any amount on account of unsound or unmerchantable whiskies sold or delivered by him to them, and he denies that they ever demanded

of or requested of him that he pay them $1,964.85 on such account. He denies that he furnished def'ts or that they received of him any unsound or unmerchantable whisky. He says that no complaint was ever made to him about unsound whisky by defendants until long after he had sold his distillery to defendants, and he says they then said five barrels of the whisky they had received from him was unsound, but they did not then or at any other time ever make any demand for compensation therefor, and he denies that he ever at any time knew that any whisky delivered by him to defendants was unsound, and he denies that he ever at any time concealed from the defendants that any such whiskies was unsound. He says that when defendants informed him that five barrels of said whisky was unsound he then proposed to defendants to return same to him on account of what they then owed him, and he then proposed and offered to take any whiskies which could be shown to be un-
27 sound when delivered by him to them and to account for same, and that defendants then and ever since failed & refused to return or to offer to return or deliver to him any whisky or to make any effort to show him that they had received any unsound whisky from him. He denies that the amount due him, to wit, the balance after deducting from the price of the distillery and the other property sold by him to defendants the amounts of different claims against him, was to- large by one thousand nine hundred and sixty-four dollars or any other sum whatever.

Further replying, plaintiff says it is true he sold on 8th March, 1882, his distillery and machinery and fixtures and good will and trade-marks, brands, & trade names to the defendants for the price of twenty thousand four hundred and fifty $\frac{8}{100}$ dollars, but he denies that said sum was paid therefor in money. He says that the defendants deducted their claim of large amount against him and paid him the balance of six thousand dollars in cash, and that he then delivered to and deposited with the defendants as stated in his petition the sum of five thousand six hundred and thirty-six dollars which they were to hold for him and to pay him.

And he says that the other property charged in his petition was sold by him to defendants at the same time the said distillery was sold to them, but the amount, quantities, and values thereof and the prices to be paid therefor *was* not ascertained and agreed upon until afterward, and that afterward the amount, quantities,
28 numbers, and prices were ascertained and agreed upon by defendants and plaintiff, and defendants agreed to pay for same as stated in his petition; but he denies that at any time he made any representation whatever to defendants or to any person as to the soundness or qualities of any whiskies made by him or of the material of which such whiskies were made; and he denies that he made or delivered to defendants or to any one for them any unsound or unmerchantable whiskey; and he denies that the reputation of said distillery, which reputation he says was good, was ever in any degree or to any extent injured by reason of any unsound whiskies delivered by him to or for defendants; and he denies that any part of the purchase price paid him for said distillery was paid for the

good name and reputation of said distillery and the whiskies made then; and he denies that the said distillery was worth seven thousand dollars less but for said good name, good will, reputation, and trade-marks thereof; and he denies that by reason of any unsound whiskies made or delivered by him said reputation, good name, trade-marks, or good will has been damaged seven thousand dollars; and he denies that there was a failure to the extent of eight thousand nine hundred and sixty-four $\frac{86}{100}$ dollars or to any other amount or extent of the consideration for which said money was paid or agreed to be paid; and he denies that the reputation, good name, good will, trade names, or trade-marks of said distillery have, any or
29 either of them, at any time or in any way been damaged by any act, representation, concealment, or knowledge or omission of this plaintiff.

McKEE & FINNELL,
For Darling.

STATE OF KENTUCKY, }
Carroll County. }

The plaintiff, A. W. Darling, says he believes the statements of the foregoing reply are true.

A. W. DARLING.

Sworn to by A. W. Darling before me, a notary public for county & State aforesaid, this March 6th, 1885.

W. B. WINSLOW,
Notary Public for Carroll Co., Ky.

And on the 11th day of May, A. D. 1885, the following order — entered herein, viz:

A. W. DARLING
vs.
ELIAS BLOCK & SONS.

The issues herein being made up and there being no jury to try same, by order of the court this case is continued until next regular term of this court.

And on the 10th day of December, A. D. 1885, the following order — entered herein, viz:

A. W. DARLING
vs
ELIAS BLOCK & SONS.

30 This day came defendant Elias Block, by his attorney, T. F. Hallam, Esq., and moved the court for a continuance herein, and in support of said motion filed certain affidavits. Said motion being heard, and the court being advised, it is ordered that this case be, and same is now, continued until the next regular term of this court, and it is further ordered that defendant pay all costs of this term.

And on the 15th day of December, A. D. 1885, the following order — entered herein, viz:

A. W. DARLING
vs.
ELIAS BLOCK & SONS.

On motion of plaintiff, by his counsel, Messrs. McKee & Finnell, it is ordered that an *alias* summons do issue against the defendants herein who are not already before the court by service of summons or otherwise.

Accordingly, on the 15th day of December, A. D. 1885, an *alias* summons & four copies issued herein. Said summons was in words & figures as follows, viz:

The President of the United States of America to the marshal of the Kentucky district, Greeting:

You are commanded to summon J. Mack, Samuel Block, Joseph Block, and Elias Block to answer, on the first day of the next May term of the circuit court of the United States for the district of Kentucky, to be held at the city of Covington, a petition filed
31 against them in said court by A. W. Darling, and warn them that upon their failure to answer the petition will be taken for confessed or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next May term of said court.

Witness Morrison R. Waite, Esq., Chief Justice of the Supreme Court of the United States, at Covington, in said district,
[L. S.] this 15 day of December, in the year of our Lord 1885, and of our Independence the 110th year.

JOS. C. FINNELL,
C. C. C., K. D.

Which summons was returned & filed May 10th, 1886, endorsed as follows, viz:

"I hereby appoint D. M. Bridges special bailiff to execute the within summons this Dec. 16, A. D. 1885.

A. J. GROSS,
U. S. Marshal.

Executed the within summons by delivering to Samuel Block a true copy thereof this Jan. 20th, 1886.

D. M. BRIDGES,
Special Bailiff.

Executed the within summons by delivering to Joseph Block a true copy hereof this 1st day of March, 1886.

D. M. BRIDGES,
Special Bailiff.

STATE OF KENTUCKY, }
Carroll County. }

I, D. N. Vance, notary public for Carroll county, hereby certify that D. M. Bridges swore to the above returns as special
32 bailiff before me this Ap'l 24th, 1886.

D. N. VANCE,
[SEAL.] *Notary Public.*

Come to hand December 18th, 1885, at 10 o'clock a. m., and executed same day on Samuel Block, at Covington, Kenton county, Ky., by delivering to him a copy of the within summons; the other defendants not found in my ba-liwick.

A. J. GROSS, *U. S. M.*,
By B. F. WARNOCK, *D. M.*

And on the 1st day of February, A. D. 1886, the answer of Samuel Block was filed herein. Said answer is in words & figures as follows, viz:

United States Circuit Court for the District of Kentucky.

A. W. DARLING, Plaintiff, }
vs. } Answer, Counter-Claim, & Set-Off of Def't Samuel Block.
ELIAS BLOCK & SONS, Defendants. }

This defendant, Samuel Block, for his answer, counter-claim, and set-off herein adopts as his own the answer, counter-claim, and set-off of his codefendant Louis T. Block, heretofore filed in this cause, and says the allegations therein contained are true, and he prays as therein prayed by said Louis T. Block.

HALLAM & MYERS,
MASTERSON & GAUNT,
J. SCHRODER,
Att'ys for Def't.

33 And on the 22 day of May, 1886, the following order was entered herein, viz:

A. W. DARLING }
vs.
ELIAS BLOCK & SONS. }

This day came defendant Joseph Block, by his attorney, T. F. Hallam, and in open court filed his answer and rejoinder herein, and said attorney entered the appearance of the def'ts herein.

The answer of Joseph Block mentioned in the foregoing order is in words & figures as follows, viz:

United States *District* Ct. Court for District of Kentucky.

ANDREW W. DARLING, Plaintiff,
against
ELIAS BLOCK *et al.*, Defendants. } Answer of Joseph Block.

The defendant Joseph Block, for answer herein, says that he is not now and never was a member of the firm of Elias Block & Sons, and nothing whatever to do with any transactions between the plaintiff and said firm of Elias Block & Sons or either of them, and does not know anything whatever about any transactions between them. Wherefore he prays to be dismissed with a judgment for his costs and for all proper relief.

HALLAM, SHRODER, M. & G.,
Att'ys for Joseph Block.

34 And on May 22, A. D. 1886, the rejoinder of the defendants to the reply of the plaintiff was filed herein; said rejoinder is in words and figures as follows, viz:

United States Circuit Court for District of Kentucky.

ANDREW W. DARLING, Plaintiff,
against
ELIAS BLOCK *et al.*, Defendants. } Rejoinder.

The defendants L. T. Block and Samuel Block, for rejoinder to the reply of the plaintiff, Andrew Darling, deny that they or either of them or any of the firm of Elias Block & Sons knew as much or more or did or could know as much or more about said whiskies sold and delivered by the plaintiff to said Elias Block & Son- as plaintiff did, or that said members of said firm or either of them knew anything about the quality of the whisky at the time of the sale and delivery to them or could possibly have known anything about it except as said plaintiff Darling represented to them. These defendants say that at the time of the sale of said whisky to said Elias Block & Sons it was in a bonded warehouse in Prestonville, Kentucky, in bond, and said Block & Sons did not have an opportunity and could not inspect said whisky or find out on examination and inspection the quality of the whisky, but had to and did rely on the representation and warrantee made by said Dar-
35 ling at the time that said whisky was smooth merchantable whisky and made out of good and sound material; all which said Darling represented and warranted at the time of the sale. These defendants deny that no complaint was made to plaintiff as to the unsound and musty condition of said whisky until long after the sale of the distillery property to Elias Block & Sons. They say that complaint of the musty and unsound condition of the whisky was made by said defendants to plaintiff as soon as it was discovered by them. They deny that the said def't- or either of them ever at any time notified said Darling that only 5 barrels of the whisky was musty or unsound, or that he ever requested or directed or of-

fered to take the five or any number of barrels back or ever offered or notified the said defendants that he would take any part of said whisky back or ever requested said defendants or either of them to return to him any of said whisky whatever. The defendants say that the whole lot of whisky was musty and unsound, and they so notified the plaintiff at the time they discovered it, but that the plaintiff failed and refused to make any reparation whatever to said defendants or compensate them in any way for the damage and injury sustained.

Wherefore they pray as before.

JACOB SHRODER,
HALLAM & MYERS,
MASTERSON & GAUNT,
For Def'ts.

36 And on the 25th day of May, A. D. 1886, the following order was entered herein, viz:

A. W. DARLING
vs.
ELIAS BLOCK & SONS.

This cause being heard upon the demurrer of the plaintiff to the answer and counter-claim of defendant, and argument thereon having been heard, and the court now being fully advised, it is ordered and adjudged that said demurrer be sustained as to the second and third paragraphs of said answer and counter-claim, and that the same be overruled as to the first paragraph thereof. It is further ordered that the defendants have until the July rules in which to file amended answer herein, and that plaintiff have until August rules to file reply thereto.

And on a day following, to wit, on the 5th day of July, A. D. 1886, came the defendants and filed an amended answer and counter-claim herein; which said amended answer and counter-claim is in words and figures as follows, viz:

United States Circuit Court, 6th Circuit, District of Kentucky.

ANDREW W. DARLING, Plaintiff,
vs.
ELIAS BLOCK & SONS, Defendants.
} Amended Answer & Counter-Claim.

37 The defendants, Elias Block, Louis T. Block, Edward J. Mack (sued as J. Mack), and Samuel Block, partners by the firm name of Elias Block & Sons, for amendment to their original answer and counter-claim in this cause, say:

First. That at all times mentioned in this petition herein they composed the firm of Elias Block & Sons, but they deny that at the beginning of this action or afterwards they were indebted to the plaintiff, Andrew W. Darling, in the sum of seventy-one hundred

and forty-four dollars and thirty-seven cents or any other sum for or on account of money deposited with them by plaintiff or accepted or received to be paid to him or on his order or for any of the merchandise or chattels in the petition alleged to have been sold by plaintiff to said firm.

These defendants admit and allege that on the eighth day of March, in the year eighteen hundred and eighty-two, they bought of the plaintiff part of the merchandise and chattels mentioned in the petition and at the agreed prices as follows, to wit:

84 bushels ground corn,	@	68½c.	$57 54
10 " " rye,	"	1.00	10 00
40 bags malt, 100 bushels,	"	1.00	100 00
88 " corn, 176 "	"	.68½	120 56
12 " rye, 24 "		1.00	24 00
7,500 bush. coal slack,		.04	300 00
150 perch rock,		1.00	150 00
2 mules			200 00
2 carts			30 00
1 dray			30 00
8 wheelbarrows			8 00
38 5 sample barrels, empty			9 50
200 seamless sacks, @ 20c. each			40 00

Amounting in all to one thousand and seventy-nine dollars and sixty cents; and they deny that they purchased from plaintiff any other merchandise or chattels than as above set forth or agreed to pay him any other prices, and these defendants say that said sum was then and there fully paid to plaintiff by them.

These defendants further say that at the same time and as a part of the same transaction they purchased from the plaintiff a certain distillery and premises at Prestonsville, Kentucky, then owned and operated by the plaintiff and known as the A. W. Darling distillery, and that said merchandise and chattels were then on said premises and being used by the plaintiff in the operation of said distillery, and that at the same time and as part of the same transaction they purchased of the plaintiff his distillery business and all the good will, brands, trade-marks, trade names, and other tokens connected with and belonging to said business and distillery, and all the property thereon and whiskies then made, and agreed to pay him therefor in all the sum of twenty thousand four hundred and fifty dollars and eighty-two cents, and that they did then and there pay him all said sum except the sum of five thousand six hundred and thirty-six dollars, which said payment was, by agreed cancellation
39 of a debt to the amount thereof, then and theretofore owing by plaintiff to these defendants.

And as to said sum of five thousand six hundred and thirty-six dollars these defendants say that the plaintiff was then and there and still is largely indebted to others and wholly insolvent, and, intending and designing to cheat and defraud his other creditors and thereto to assert to them that he had been fully paid all of said purchase-money, he then and there requested these defendants to

retain said balance as a deposit, and thereupon the same was paid by these defendants to plaintiff and by him immediately returned to these defendants, and that this is the same transaction mentioned in the petition as a deposit.

Second. These defendants, for further answer and for counter-claim against the plaintiff, reiterate all the allegations of the foregoing defense and say further that to induce them to make said purchase and pay said sum therefor the plaintiff falsely and fraudulently represented and warranted to them that the whiskies then and theretofore made at said distillery and then on hand, in bond, and in the market and known to the trade by the name and brand of the A. W. Darling and H. J. Whitehead whiskies were of good reputation, were good, sound, and merchantable, were made of good and sound material, not rotten nor musty, and were so reputed to the trade and public, and that by reason thereof the good will, reputation, brands, trade-marks, and trade names of said distillery were of great
40 value, to wit, of the value of $9,000; that by means of said false and fraudulent representations these defendants were induced to and did because thereof make said purchase and agree to pay plaintiff said purchase price, and same was excessive by $9,000; but the fact then was and the plaintiff well knew and these defendants did not and could not know that said whiskies were not of good reputation, were not good, sound, or merchantable, were not made of good or sound material, nor so reputed to the trade or public, but were made of rotten and musty material, and the good will, reputation, brands, trade-marks, and trade names of said business and distillery were of no value, and by reason thereof these defendants suffered injury and damage in the sum of nine thousand dollars.

Wherefore these defendants pray judgment dismissing the petition and for nine thousand dollars' damages and all proper relief.

HALLAM & MYERS,
MASTERSON & GAUNT,
J. SHRODER,
For Defendants.

Elias Block, one of the members of the firm of Elias Block & Sons, the defendants herein, says that the statements contained in the foregoing amended answer and counter-claim are true, as he verily believes.

ELIAS BLOCK.

Subscribed and sworn to before me by Elias Block this 6th day of July, A. D. 1886.

JOS. C. FINNELL, *Clerk*,
By CHAS. Y. GRAY, *D. C.*

41 And on July 6th, A. D. 1886, a 2nd amended answer was filed herein; which said 2nd amended answer is in words and figures as follows, viz:

United States Circuit Court, Sixth Circuit, District of Kentucky.

ANDREW W. DARLING, Plaintiff,
against
ELIAS BLOCK *et al.*, Defendants. } 2nd Am'd Answer.

For further amendment to their answer, the defendants, Elias Block & Sons, say that in addition to the payments on the alleged deposit which are admitted in the petition they, on the twenty-fifth day of March, in the year eighteen hundred and eighty-two, on the order and request of the plaintiff, paid to H. Spilman & Co. one thousand dollars for the account of plaintiff, which payment was by mistake of the draftsman omitted from their former pleadings.

Wherefore they pray as before.

HALLAM & MYERS,
For Def'ts.

Elias Block, one of the members of the firm of Elias Block & Sons, defendants herein, says that the statements contained in the foregoing 2nd amended answer are true as he verily believes.

ELIAS BLOCK.

Subscribed and sworn to before me this July 6th, 1886, by Elias Block.

JOS. C. FINNELL, *Clerk*,
By CHAS. Y. GRAY, *D. C.*

42 And on the 28th day of July, A. D. 1886, came this plaintiff and filed a motion herein; said motion is in words & figures as follows, viz:

United States Circuit Court, Sixth Circuit, District of Kentucky.

ANDREW W. DARLING
vs.
ELIAS BLOCK, &c. } Motion to Strike from Am'd Answer.

The plaintiff comes and moves the court to order stricken from the amended answer filed herein on the 5th of July, 1886, as follows: All that part of the answer contained in the 1st paragraph thereof, commencing at the 19th line of the third page with the words "and as to the said sum of five thousand six hundred and thirty-six dollars these defendants say that the plaintiff was then and there and still is largely indebted to others and wholly insolvent, and, intending and designing to cheat and defraud his other creditors, and thereto to assert to them that he had been fully paid all said purchase-money, he then and there requested these defendants to retain said balance as a deposit, and thereupon the same was paid by these defendants to plaintiff and by him immediately returned to these defendants, and that this is the same transaction mentioned in the petition as a deposit," — the end.

McKEE & FINNELL.

And on the same day, to wit, on the 28th day of July, A. D.
43 1886, the plaintiff filed his demurrer to the amended answer of the defendants; which said demurrer is in words & figures as follows, viz:

United States Circuit Court, Sixth Circuit, District of Kentucky.

ANDREW W. DARLING, Plaintiff,
vs.
ELIAS BLOCK, &c., Defendants.
} Demurrer to Am'd Answer.

The plaintiff, Andrew W. Darling, comes and demurs to the amended answer filed herein by def'ts on the 5th day of July, 1886, and says that said answer is insufficient in law to bar or preclude plaintiff from having and maintaining his action and from recovering judgment against def'ts for the claim set forth in his petition, because he says—

That the 1st paragraph of said answer does not state facts sufficient to constitute a defense to plaintiff's petition.

2nd. The 1st paragraph of said answer does not state facts sufficient to support a defense to plaintiff's petition.

3. The second paragraph of said answer does not state facts sufficient to constitute a cause of defense to plaintiff's petition.

4. The second paragraph of said answer does not state facts sufficient to support a cause of defense to plaintiff's action.

5. Because the second paragraph of said answer is not sufficient in law nor are the facts therein set forth sufficient to support a counter-claim.

44 6th. Because the facts set forth in said second paragraph are not sufficient to maintain or support a set-off.

7th. Because the facts alleged in said second paragraph are not sufficient to constitute or support a cause of action against the plaintiff, or to constitute or support a cause of defense ag'st plaintiff's action.

McKEE & FINNELL,
For Plaintiff.

And on July 28th, A. D. 1886, the plaintiff filed his reply herein; said reply is in words and figures as follows, viz:

United States Circuit Court, Sixth Circuit, District of Kentucky.

ANDREW W. DARLING, Plaintiff,
ag'st
ELIAS BLOCK *et al.*, Defendants.
} Reply to Amended Answer & Counter-Claim.

The plaintiff, Andrew W. Darling, for reply to the amended answer and counter-claim of defendants filed herein on July 5th, 1886, and not waiving his demurrer thereto, denies that the defendants paid him for the merchandise and chattels set forth in his account the sum of $1,079.60, or any other sum, at the time of their purchase or any other time, except the sum of $3,103 paid him at divers times

and in divers amounts on all accounts as credited on his account sued on. He admits that the said merchandise and chattels were purchased at the same time and on the same date, but he
45 denies that the merchandise and chattels and the distillery and premises at Prestonville were part of the same transaction, and says that the distillery and premises were purchased in one transaction at the price of $20,450.82, and the merchandise and chattels in another at the prices set forth in the account filed with his petition, and he denies that they then or there or at any time or place paid him all of said sum of $20,450.82, except the sum of $5,636, or that any such sum was paid by agreed cancellation of any debt to the amount thereof then or theretofore owing by plaintiff to defendant. Plaintiff says that at the time of the purchase of the said distillery and premises, including good name, brands, &c., he was indebted to defendants in about the sum of $14,450.82, partly by notes bearing interest and partly on open account, and said debt was then and there by agreed cancellation in said transaction paid to and retained by them, and that they also retained the further sum of $364 by agreement, which sum was owing by plaintiff to another or other persons than the defendants, but for which the distillery property and perhaps also said defendants were likely liable.

Plaintiff denies that as to said sum of $5,636 he intended or designed to cheat or defraud his other creditors or thereto to assert to them that he had been fully paid said purchase-money; that he then or there or at any time or place requested defendants to retain said balance as a deposit, or that the same was paid
46 by them to him or by him back to them with any such intention, but he says said balance was retained by them with his consent as a deposit, the same or any balance thereof remaining in their hands to be used by them in paying to themselves, in whole or in part, such sum as he might thereafter in the future owe to them for slop to be used by him in having cattle or stock fed in the pens at said distillery, and they promised and agreed with him in parole at the time that thereafter in the future they would furnish him the slop made at said distillery for said purpose at a reduced figure, below even the lowest customary, at such times as he might be feeding cattle; but the said contract, as plaintiff learned afterwards to his great disappointment, was not enforceable at law by reason of not having been made in writing and signed by them and not having to be completed and performed within one year, and defendants declined and refused to perform the same, to the great loss of plaintiff, and now unjustly refuse even to return to him the said balance of said deposit.

The plaintiff, for reply to the paragraph numbered second of said answer and counter-claim, denies that to induce defendants to make said purchase or pay said sum therefor the plaintiff, falsely or fraudulently or otherwise, represented or warranted to them that
47 the whiskies then or there or thereafter made at said distillery or then on hand, in bond, or in the market or known to the trade by the name or brand of A. W. Darling or H. J. White-

head whiskies were of good reputation or were good, sound, or merchantable or were made of good or sound material, not rotten or musty, or were so represented to the trade or public, or that by reason thereof the good will, reputation, brands, trade-marks, or trade names of said distillery were of great value, to wit, of the value of $9,000. He denies that by means of any such representations defendants were induced to or did make said purchase or agree to pay plaintiff said purchase price, or that the same was excessive by $9,000. He denies that the fact was or that plaintiff knew it or that defendant did not or could not have known, if such had been the fact, that said whiskies were not of good reputation or were not sound or merchantable or were not made of good or sound material, nor so reputed to the trade or market or public, or that they were made of rotten or musty material, or the good will, reputation, brands, trade-marks, or trade names of said business or said distillery were of no value, or that by reason thereof def'ts suffered injury or damage in any sum whatever.

Plaintiff states, on the contrary, that the defendants well knew all about the distillery and premises and reputation and the reputation of the whiskies made thereat and of the trade names, trade-marks, &c., used in connection therewith, and had been
48 buying and selling the whisky made thereat and furnishing to or buying for the distillery the material used in making thereof for several years before their purchase, and especially for the year last *year* theretofore past, and needed not to make an enquiry of plaintiff in regard thereto, and made no such enquiry, and he made no representation to them in regard thereto.

Plaintiff, for reply to the second amended answer filed on July 6th, 1886, denies that the defendants paid to H. Spilman & Co. $1,000 on or about March 25, '86, for account of plaintiff in addition to payments on deposit admitted in the petition, and says that said payment of $1,000 to Spilman is one of the payments going to make up the $3,103 for which credit was given in account filed with petition, which amounts are as follows:

To plaintiff	$20
" " for Schwill	308
" "	125
" H. Spilman	1,000
" plaintiff	500
" W. C. Darling on written order	550
" plaintiff	300
" W. C. Darling on written order	300
Total	$3,103

Therefore plaintiff prays as before and for all proper relief.

McKEE & FINNELL.

STATE OF KENTUCKY, }
Carroll County. }

49 The plaintiff, A. W. Darling, says that the statements of the foregoing reply are true as he verily believes.

A. W. DARLING.

Sworn to by A. W. Darling before me, a notary public within and for the county and State aforesaid, this 26th day of July, 1886.

[L. S.] D. N. VANCE,
N. P. C. C., Ky.

And on the day following, to wit, on the 21st day of December, A. D. 1886, the following order was entered herein, viz:

A. W. DARLING }
vs.
ELIAS BLOCK & SONS. }

This cause coming on to be heard, came plaintiff in person and by his attorneys, Messrs. McKee and Finnell; came also the defendants in person and by their attorneys, Messrs. Hallam and Shroder, and, the parties, by their attorneys, having announced ready for trial, came the following jury, to wit: Joseph McClintock, F. E. Earl, Robert Hemingray, Joseph Rich, Jr., J. L. Brink, D. W. Muncy, Ed. Brown, Owen Gaines, Thos. J. Crouch, Phillip Senour, R. S. Richardson, & Robert Rucker, who were elected, tried, and sworn well and truly to try the issue joined. The jury heard a portion of the plaintiff's evidence, and, the hour for adjournment having arrived, the jury were cautioned by the court and discharged from the further consideration of the case until to-morrow morning at 9 o'clock a. m.

50 And on December 22, A. D. 1886, the following order was entered herein, viz:

A. W. DARLING }
vs.
ELIAS BLOCK & SONS. }

This day came again plaintiff, in person & by attorneys; came again defendants, in person & by attorneys; came also again the following jury, to wit: Joseph McClintock, F. E. Earl, Robert Hemingray, Jos. Rich, Jr., J. L. Brink, D. W. Muncy, Ed. Brown, Owen Gaines, Thos. J. Crouch, Phillip Senour, R. S. Richardson, & Robert Rucker. The jury heard the evidence and arguments of counsel, and were by the court instructed in the law of the case, and thereupon retired to their room to consider the case. Presently returning into court, they presented the following verdict, viz:

"We, the jury, find for the plaintiff in the sum of thirty-nine hundred thirty-eight and $\frac{40}{100}$ ($3,938.40) dollars, with legal interest from March 11th, 1882.

"F. E. EARL, *Foreman.*"

It is therefore considered by the court that plaintiff have and recover of defendants the sum of thirty-nine hundred and thirty-eight and $\frac{40}{100}$ dollars ($3,938.40), with interest thereon at the rate of six per centum per annum from the 11th day of March, 1882, until paid, and their costs herein expended, to be taxed, for all of which they may have execution.

And on the same day, to wit, on the 22 day of December,
51 A. D. 1886, came the defendants and filed their motion and grounds for a new trial; which said motion and grounds are in words and figures as follows, viz:

United States Circuit Court, District of Kentucky.

A. W. DARLING, Plaintiff,
against
ELIAS BLOCK *et al.*, Defendants. } Motion & Grounds for New Trial.

The defendants in the above-styled cause move the court to set aside the verdict and grant them a new trial of the issues of fact herein on the following grounds, to wit:

First. The verdict is not sustained by sufficient evidence.

Second. The verdict is contrary to law.

Third. There is error in the assessment of the amount recovered.

Fourth. There is error in the verdict in finding interest for the plaintiff from a time prior to the time from which interest is claimed in plaintiff's pleadings.

Fifth. There was error of the court in charging the jury that they might find interest as set forth in the last preceding ground hereof.

Sixth. The court erred in charging the jury that the papers introduced by the parties showed that there was a balance of five thousand six hundred and thirty-six dollars due the plaintiff on the sale of the real estate, the distillery, & fixtures.

Seventh. The court erred in instructing the jury that the
52 contracts introduced did not include the personal property.

Eighth. The court erred in telling the jury that the court made the amount of the personalty near fifteen hundred dollars.

Ninth. The court erred in charging the jury that if they found from the plaintiff's evidence that the defendants were to pay more for the personalty than the receipt indicated on the check for one thousand and seventy-nine dollars and sixty cents they should allow him the excess.

Tenth. The court erred in charging the jury that they might allow interest on any sum found due the plaintiff without limiting the time from which interest might be allowed.

Eleventh. The court erred in charging the jury that the proof showed that before the contract was entered into the defense had notice of musty whisky being made and several items returned.

Twelfth. The court erred in charging the jury that the witness, Joseph Back, had returned musty whisky to the defendants in January of the year eighteen hundred and eighty-two.

Thirteenth. The court erred in charging the jury that defendants could not maintain claim for damages without showing the exact damage.

Fourteenth. The court erred in charging the jury that the defendants had not made out any case for damages.

Fifteenth. The court erred in admitting in evidence the alleged letters of defendants to plaintiff.

Sixteenth. The court erred in refusing to admit defendant's evidence that plaintiff's conversion of the unpaid balance into a
53 deposit was with intent to defraud his creditors.

HALLAM & MYERS,
Attorneys for Defendants.

And on December 22, A. D. 1886, the following order was entered herein, viz:

A. W. DARLING
vs.
ELIAS BLOCK & SONS.

This day came again defendants, by counsel, Messrs. Hallam & Shroder, and, filing grounds, moved for a new trial herein. The court, being advised, overrules said motion; to which ruling of the court defendants, by counsel, except.

And on December 22, A. D. 1886, the following order was entered herein, viz:

A. W. DARLING
vs.
ELIAS BLOCK & SONS.

On motion of plaintiff, A. W. Darling, there is assigned of the judgment herein to McKee & Finnell, five hundred dollars; to H. Spillman, two hundred and sixty dollars, and the remainder to Henry Winslow, trustee for Eliza J. Darling.

(Signed) A. W. DARLING.

And on a day following, to wit, on the 24th day of December, A. D. 1886, two orders were entered herein; which said orders are in words and figures as follows, viz:

54 A. W. DARLING
vs.
ELIAS BLOCK & SONS.

This day came the plaintiff, by Geo. R. McKee, Esq., his attorney, and moves the court to allow him to remit the sum of one hundred dollars, part of the judgment herein rendered on a former day of this term. Said motion is set for hearing on the 17th day of January, 1887, at the adjourned term of this court.

A. W. DARLING
vs.
ELIAS BLOCK & SONS.

On defendants' motion, there is granted them to January 17th, 1887, to tender a bill of evidence and exceptions. The plaintiff consents to the above.

And on the 17th day of January, A. D. 1887, the following order — entered herein, viz:

A. W. DARLING
vs.
ELIAS BLOCK & SONS.

This day came the defendants, by T. F. Hallam, Esq., one of their attorneys, and under the agreed order heretofore entered herein now tender their bill of evidence and exceptions herein. The court, not being advised, takes time.

And on the 17th day of January, A. D. 1887, the following order was entered herein, viz:

55 A. W. DARLING
vs.
ELIAS BLOCK & SONS.

This cause being heard on the motion of plaintiff to remit $100.00 of the judgment herein, the court now, being fully advised, orders that said motion be, and same is, granted, the def'ts being present by counsel and not objecting.

And on January 17th, A. D. 1887, the following order — entered herein, viz:

A. W. DARLING
vs.
ELIAS BLOCK & SONS.

On motion of the plaintiff, A. W. Darling, and H. M. Winslow and Eliza J. Darling, it is ordered that so much of the order of assignment of the judgment as transfers to H. M. Winslow a part of said judgment in trust for Eliza J. Darling be set aside; and, on motion of A. W. Darling, there is assigned of said judgment to H. M. Winslow three hundred and fifty dollars and to W. Montfort and W. M. Fisher, jointly, one hundred & fifty dollars.

And on January 20th, A. D. 1887, the following order was entered herein, viz:

A. W. DARLING
vs.
ELIAS BLOCK & SONS.

On motion of plaintiff, A. W. Darling, the remainder of
56 the judgment herein not heretofore assigned is now assigned to H. M. Winslow in trust for Mrs. Darling, wife of the plaintiff.

And on a day following, to wit, on the 19 day of May, A. D. 1887, the following order was entered herein, viz:

A. W. DARLING
vs.
ELIAS BLOCK & SONS.

The bill of exception tendered herein on the 17th day of January, 1887, is now signed, sealed, and made part of the record.

Said bill of exceptions is in words and figures as follows, to wit:

United States Circuit Court, District of Kentucky.

A. W. DARLING, Plaintiff,
against
ELIAS BLOCK *et al.*, Defendants. } Bill of Exceptions.

Be it remembered that on the trial of this cause, to wit, on Dec. 22, 1886, the plaintiff in his own behalf testified that he had received by mail from defendants certain written letters and *and* offered said letters in evidence; to each and all of which said letters as evidence the defendants objected; which objection was over-
57 ruled and said letters were thereupon read in evidence; to which the defendants excepted and still except.

Said letters are as follows, to wit:

28, 30, and 32 Sycamore street. Office of Elias Block and Sons, distillers.

All letters to be addressed to P. O. box 625.

CINCINNATI, *April* 22, 1881.

Mr. A. W. Darling:

We bought car-load rye for you yesterday at 1.33, delivered on boat, sacked. You must return sacks at once. Whitehead has about 600 sacks down there belonging to Roots & Co. Have them sent up to them. If you could have waited a week we could have bought rye much cheaper. Grain of all kinds is going down. Perin sent us notice that you ordered car-load malt. You had better send us your order for grain. We can buy cheaper and better terms. You need not pay Mr. Perin cash, as malt is sold on time. Always send us the orders to buy. Are you ready to receive the pipe for putting steam in the bonded warehouse cellar, & is your engineer capable of putting it up? Let me know how many elbows you need; your

engineer can see. Please give us all information at once; we
58 want to send the pipe down. Don't delay this matter. When are you coming up again?

Yours truly, E. BLOCK & SON.

CINCINNATI, *Aug.* 31, 1881.

(Entered.)

A. W. Darling, Esq., Carrollton.

DEAR SIR: We have to-day received the following bills, & have charged same to your ac't, viz: From Blackmore & Kinsey, 1 car middlings (365 sacks) 28010, 365, 24645, at $32.50—$449.23. From the Cin'ti Transfer Co., I., C. & L. to mail line (365 sacks middlings) 28010; sacking and use of sacks, 8.40 and 5.50—$13.90. From William Harvey (101 bags) of rye, 238.41 bus., 1.17—279.32. Total am't charged, $742.45. We bought of Joseph Good (1) car corn, which we shipped to you in bulk, all rail, at 8 cents per 100 bulks, through the distillery. The same will be transferred to-day and shipped to-morrow. No doubt you are aware that the same must be sacked at Northville. Inform us per return mail what time during the day the pipe will be cool enough to tap in order to connect the steam-pipes, which will be placed in the warehouse.
59 Please empty all the sacks of grain sent down to you as soon as possible; then tie each lot of sacks—that is, those containing rye, those middlings, &c.—seperate; mark them, stating what grain they contained, and ship to us. Please be careful & give your attention to each particular item in this letter.

Yours truly, ELIAS BLOCK & SONS.

P. S.—Don't fail to inform us at once in regard to the boiler, as stated above.

E. B. & S.

We to-day telegraphed you, viz., Why don't you send those gauger's details for the 23 barrels tax paid yesterday. It is absolutely necessary that the gauger's details must come up with the order for withdrawal, so we have ample time to draw on the parties for taxes. You must give more attention to the same and let it not occur again.

E. B. & S.

SEP. 1, 1881.

A. W. Darling, Esq.

60 DEAR SIR: Your letter Aug. 31 to hand and contents noted. We see you will be out of corn again. Why don't you notify us sooner? We have ordered a car down by rail. You must have it sacked there at Worthville, as Mr. Darling said he can have it sacked there cheaper than we can here. Did you receive the 101 sacks rye? Always let us know when ever-thing comes to hand; have all grain properly weighed and send us weights; also return all sacks to us. To-day we received a bill from Gale Bros. for 84 seamless bags at 20 cents each; unless you return them to us at

once we will charge them to your account. We have bought 100 cotton seamless bags, 2½ bushels each, for you; it is necessary; it costs too much to borrow them. Don't forget to send us all weights nett; also grain bags. We will see McCullough about taking our whiskey at the mill. Have corn weighed at once. In regard to the rate of freight we have private arrangements with the R. R.; also the mail line, and you can pay them accordingly. By rail our contract is 8 cents per 100 on all grain; by boat, 8 cents per bag & 10 cents for empty bbls. Don't expose these rates or you
61 will loose the benefit of them; don't pay any more. If you have paid the mail line 15 cents per sack let us know. You had better sell your slop; it is a sure thing. We think you can get 15 cents per bushel here for it; let us know if we shall sell it. We would advise you to take a certainty for an uncertainty. We are sending a man down next Monday night on the mail boat to put steam in the cellar of brick warehouse; have your boiler cold either Tuesday evening or Wednesday morning so he can tap the drum. Please read this letter carefully and obey instructions.

Yours truly, E. B. & SONS.

CINCINNATI, *Sep.* 3, 1881.

A. W. Darling, Esq.:

Yours 2nd to hand. We will endeavor to keep you supplied with grain bbls. Let us know the proportions of grain you need every day. Shall we engage Mr. Spillman to attend to your supplies? He will do it for half cent per bushel; he is well acquainted and it will save yours a great deal of trouble. Gale Bros. received the
62 number of bundles you sent, but the question is, Were all his sacks in those bundles? The freight on most everything is as cheap by rail as by mail line, and while the river is low we think you had better ship by rail altogether. Please acknowledge receipt of everything we ship to you. What are your runs on high wines? You are drawing upon us pretty lively. While we do not object to advance you a little money for distillery purposes, we do not propose to have you invest that money in brick yards and other things. The money we advance you is solely for the purpose of making whiskey, and nothing else. We have spoken to the collector about having a guager stationery, and he promised to arrange all satisfactorily.

Yours truly, E. B. & SONS.

CINCINNATI, *Sep.* 20, 1881.

A. W. Darling, Esq., Carrollton, Ky.

DEAR SIR: We enclose you bill for 720 bbls. shipped you
63 to-day, amounting to $228, with which please credit our account. We have also paid 547 bush. rye, 1.12½, $615.37; 498 bush. corn, .68, $338.65, with which please credit us.

Yours truly, ELIAS BLOCK & SONS.

Hurry up the 5 bbls., 6362, and 5, 1461
6366, 1405
and 25 bbls., 4992—501 b.
5—299

CINCINNATI, *Sep.* 5, 1881.

A. W. Darling, Esq.:

Your letter rec'd. You draw again for $350 for hands when your pay-roll *in* only about $180 per week. How is that? We must stop paying those drafts. We have paid tax on several lots of whiskey. Why are they not shipped by rail? In regard to the piping, you are mistaken, we think, and after we find you have not enough steam you will have to put another boiler in. We have sent two cars of corn per rail and will send more this week. Don't keep up this drawing, especially as we are trying to supply you with grain and cooperage.

Yours respectfully, ELIAS BLOCK AND SONS.

CINCINNATI, *Dec.* 3, 1881.

64 A. W. Darling, Esq., Prestonville, Ky.

DEAR SIR: Yours *to* the 2nd inst. to hand. In reply allow us to state that the assessment was placed upon you and it is your interest that you see that it is taken off again. We did not own a barrel of whiskey in the bonded warehouse on the 7*st* of January last. On the contrary, we had sold ahead, and it was delivered to the parties as soon as the warehouse receipts were delivered to us. If we can be of any assistance to you we will cheerfully give you any information we can.

Yours respectfully, ELIAS BLOCK & SONS.

The plaintiff introduced evidence conducing to prove the sale of the articles as set forth in his account filed and at the prices of the several articles as charged therein.

Plaintiff further introduced evidence conducing to prove that the whiskies made by him were made principally from grain purchased by def'ts and sent to him, and that the said whiskies
65 had been received and sold by the def'ts after they had had full opportunity to inspect the same, and did from time to time receive the whiskey without complaint.

And thereafter at said trial the defendants offered testimony conducing to show that the debt of defendants to plaintiff for unpaid purchase-money on the transaction in controversy was changed in form to a deposit with defendants for plaintiff's benefit under the assumed name of Charles Adams, and that said change was at plaintiff's instance and was for the purpose of concealing the same indebtedness from his creditors with intent to defraud them; which testimony the court excluded; to which the defendants excepted and still except; and at said trial defendants Elias Block — having given testimony conducing to prove that the tangible property purchased in the transaction was not of greater value than ten thousand dollars without the good reputation of the "A. W. Darling" brand of whiskey, and that the said alleged good reputation
66 was a material inducement to said purchase, and that same was impaired and destroyed by the using of musty and rotten grain by plaintiff in his manufacture of whiskey in 1881, and that the use of such material could not have been discovered until said

whiskey was a summer old, the plaintiff offered testimony conducing to show that defendants had not offered to return to plaintiff such whiskey made of rotten or musty material; to which defendants objected; which objection was overruled and said testimony admitted; to which defendants excepted and still except.

And at said trial was introduced in testimony a certain written contract of March 28, 1881, as follows, to wit:

It is agreed between Elias Block and Sons, of Cincinnati, Ohio, and A. W. Darling, of Carrollton, Kentucky, that in consideration of the mutual agreement herein entered into—

1. That said Darling will, for and to said Elias Block & Sons exclusively, make, sell, and deliver for the period or periods and price and in the manner, kind, and places and upon the terms and
67 stipulations hereinafter set forth the entire crops of Bourbon whiskey that shall be made by him, his heirs, successors, assign-, executors, and administrators, at his distillery or upon his distillery premises at Prestonville, Kentucky; said whiskey to be the same as that heretofore made and known as "Darling's" or "Whitehead's" "sweet mash, fire copper Bourbon whiskey;" and that the- will make said whiskey of good, sound grain, wholesome materials, not rotten or musty, the same as heretofore made and used, and that said whiskey shall be sound, merchantable, and not musty; and that he will well, safely, and carefully fill or "pack" the same in the "pooperage" to be furnished by said Elias Block and Sons as hereinafter provided for, and in no other, and that until said whiskey is withdrawn and forwarded carefully and safely store and keep the same in safe bonded warehouses according to law, free to said Elias Block and Sons, successors, survivors, or assigns, of all charge for storage (during the first year) and for labor and all expenses (at all times) of said whiskey and any part thereof, and that he will
68 safely and carefully deliver said whiskey and any and all portions thereof as and when so requested by said Elias Block and Sons, successors, survivors, or assigns, on board boat on the Ohio river at said Prestonville for purposes of transportation whenever boats are running and can be had for that purpose and at other times on board cars at the railroad stations at Worthville, Kentucky, all such deliver-s to such places to be free of charge to said Elias Block and Sons, successors, survivors, or assigns, and that he will make said whiskey in such quantities and at such times as said Elias Block and Sons, their survivors, successors, or assigns, may from time to time elect and direct, and that he will promptly furnish them with true and accurate invoices, gauger certificates, and warehouse receipts, and that he will make *us* whiskey elsewhere nor suffer nor permit any other person to make whiskey for him or in or by his name, nor that his heirs, executors, administrators, successors, or assigns will do, permit, or suffer the same to be done during the terms or existence of this contract, its extensions and successors, here-
69 inafter referred to and contemplated.

2. That said Elias Block & Sons agree to pay to said Darling for each and every gallon of said whiskey deposited in bond, as

above stipulated, the sum of twenty-seven (27) cents, according to invoices, gauger's certificates, and warehouse receipts delivered to and received by them, such payments to be made upon settlements to be made on or about the first day of every month and first deducting, however, all charges, outlays, liabilities, and expenses made and incurred by them on account of said Darling or said whiskey for cooperage at going market rates (which said Elias Block and Sons agree to furnish) for materials, freight, insurance, cash advance, and the like.

3. It is agreed that this contract shall take effect on the first day of April, 1881, and continue in force from thence for a period of two years, and that at and after the expiration of said two years it shall be, at the option of said Elias Block and Sons, continue- and be extended thenceforward for a further period of three years upon
70 same terms and stipulations as herein agreed to, and that after said three years said Elias Block & Sons shall have the first preference and refusal of entering into a contract of similar nature to this with said Darling, his heirs, executors, administrators, successors, and assigns.

4. It is agreed that this contract shall be specifically performed by the heirs, executors, administrators, successors, and assigns of said Darling if said Elias Block and Sons so elect and direct.

5. It is agreed that in the event said Darling, his heirs, executors, administrators, successors, — assigns, shall be unable or willing to operate said Darling as herein agreed to or continue doing so said Elias Block & Sons may, if they so elect, take possession and charge of the whole distillery, premises, appurtenances for the purpose of operating the same by whatsoever aid and agency they may choose, and shall have the sole and exclusive right of using said Darling's name on whiskey, as well as for the purpose of operating said distillery, and that this contract shall be used and constituted
71 as said Darling's consent and waiver of all and every right as against the United States or Elias Block and Sons, as well as the like consent and waiver of said Darling's heirs, executors, administrators, successors, and assigns, and said Elias Block and Sons will pay during the time of their use of said distillery, and so forth, to whomsoever may be entitled thereto a fair and reasonable sum for the use and occupation of said premises only.

6. That said Darling will assign his insurance upon said premises to said Elias Block & Sons as indemnity for all damages or losses they may suffer or incur by reason of any violations on his part of this contract, and that he will reimburse said Elias Block and Sons for any expenses they may make in effecting insurance for their own benefit upon said distillery and warehouses and contents so far as their interest may appear, and said Darling does hereby agree to guarantee to said Elias Block and Sons that the premium of insurance upon the contents of any and all said Darling's ware-
72 house- shall not exceed for each warehouse the rate of one per cent. per annum, and that he will bear the excess of such premium over and above said one per cent.

Signed this 28th day of March, 1881.

ELIAS BLOCK & SONS AND
A. W. DARLING.

And a certain other written contract of March 6, 1882, as follows, to wit:

This agreement, made on this 6th day of March, 1882, between A. W. Darling and Elias Block, witnesses as follows:

That, in consideration of the mutual agreement herein contained, said Darling does hereby agree to sell, transfer, and convey to said Elias Block in fee simple by deed of general warranty, with release of dower, &c., all his distillery, land, and property thereon, with all appurtenances, including machinery, warehouses, cattle pens, corn cribs, &c., &c., said distillery, land, and property being situated in Prestonville, Carroll county, Kentucky, being the same premises conveyed to him by Elias Block and wife by deed dated March 26, 1881, and recorded in the office of the clerk of the Carroll county court (Kentucky) in Deed Book 15, page 43, to which refer-
73 ence is here made, together with all the appurtenances, easements, and privileges thereunto belonging; and he also agrees to sell and convey, and does hereby sell and convey, with said premises the distillery business and all and every the property and rights connected with and incident and belonging to the same (which business is carried on upon said premises), including among all said property the good will, all the brands, trade-marks, and other tokens, names, and signs used in said business and on the whiskey made therein; and said Darling further agrees that neither he nor his heirs, administrators, executors, or assigns will use or cause, suffer, or permit to be made use of the name Darling, whether singly or in combination with other words or as forming part of form, corporate, or other names as indicating the origin of any whiskies made elsewhere than on said premises or as indicating the character or kind of such whiskies, nor will they in like manner use or permit the use of said name, brands, trade-marks, and so forth by any other, it being the intent to convey to said Block or his
74 assigns, heirs, executors, and administrators, the exclusive right to make use of the same in the manufacture and sale of whiskey to be there distilled. In consideration whereof said Block agrees to buy said premises and all other property and — thereof hereinbefore agreed to be sold and conveyed to him by said Darling, and to pay therefor the sum of twenty thousand four hundred and fifty dollars and eighty-two cents, which sum, it is understood, shall be inserted in the deed to be used by said Darling and wife toward execution of this contract. The said $20,450.82 consists of six thousand dollars cash to be paid, and also $14,450.82 indebtedness due Elias Block & Sons from said Darling, which will be released and cancelled by said Elias Block and Sons, said $14,450.82 including the sums and interest secured by mortgage on said distillery premises made to said Block and now of record in the clerk's office of said Carroll county, Kentucky, to which reference is here made.

ELIAS BLOCK.
A. W. DARLING.

75 And a certain written deed of March 8, 1882, as follows, to wit:

Know all men by these presents that A. W. Darling and Eliza J. Darling, his wife, of the county of Carroll and State of Kentucky, for and in consideration of twenty thousand four hundred and fifty dollars and eighty-two cents, to them paid by Elias Block, the receipt whereof is hereby acknowledged, do hereby bargain, sell, and convey to the said Elias Block, his heirs and assigns forever, the following-described real estate, to wit, a certain tract or parcel of land in the county of Carroll and State of Kentucky, adjoining the town of Prestonville, and described as follows, to wit:

About three acres of land with a distillery thereon (known as the A. W. Darling distillery), including all the machinery and fixtures connected therewith, with the tenant-house thereon, together with all the buildings on said premises, store-houses, corn cribs, cattle and hog pens, and so forth, and together with all easements, water privileges, and the like, said premises being bounded on the east by the Kentucky river and on the north by the New Castle and Carrollton turnpike, on the west and south by the lands sold
76 by A. W. Darling to B. B. Elston and subsequently owned by W. B. Winslow, together with all trade-marks and trade names connected with the business and distillery (and the whiskies made there) conducted upon said premises, together with all the privileges and appurtenances to the same belonging; to have and to hold the same to the said Elias Block, his heirs and assigns forever, the grantors, their heirs, executors, and administrators, thereby cobenanting with the grantee, his heirs and assigns, that the title so conveyed is clear, free, and unincumbered, and that they will warrant and defend the same against all legal claims whatsoever.

To witness whereof the said grantors, A. W. Darling and Eliza J. Darling (his wife), who includes releases and transfers to said grantee, all homestead exemption, dower and other right to said property, hereunto set their hands this eighth day of March, in the year 1882.

A. W. DARLING. [SEAL.]
ELIZA J. DARLING. [SEAL.]

STATE OF KENTUCKY, } *sct:*
County of Carroll, }

77 I, R. F. Harrison, clerk of the county court in and for said county and State, do certify that the foregoing instrument of writing from A. W. Darling and Eliza J. Darling, his wife, to Elias Block was this day produced to me by the parties in said county and State and then and there acknowledge- by said A. W. Darling and Eliza J. Darling, his wife, to be their act and deed, and the contents and effects of the instrument being explained by me to said Eliza J. Darling, wife of said A. W. Darling, separate and apart from her husband, she thereupon declared that she did freely and

voluntarily execute and deliver the same to be her act and deed, and consented that the same might be recorded.

Given under my hand this 8th day of March, 1882.

R. F. HARRISON,
Clerk Carroll County Court.

Instructions.—The acknowledgement out of Kentucky and within the United States must — before and certified under his seal of office by the clerk of the court or his deputy or by a notary public, mayor of a city, or secretary of state or commissioner of deeds of
78 Kentucky, or by a judge under the seal of his court. The officer should state his official character in his certificate. No other certificate but the one is required.

And a certain written bill of sale, March 8, 1882, as follows, to wit:

Bill of Sale, M'ch 8, 1882.

MARCH 8TH, 1882.

Elias Block bought of A. W. Darling.

84 bu. (est'm'd) corn at	68 cents	$57 54
10 " " rye "	1.00	10 60
40 bags malt, 100 bu., "	1.00	100 00
88 " corn, 176 " "	.68	120 56
12 " rye, 24 " "	1.00	24 00
7,500 bushels coal slack	.04	300 00
150 pearch rock	1.00	150 00
2 mules		200 00
2 carts		30 00
1 dray		30 00
8 wheelbarrows		8 00
5 sample barrels, empty		9 50
200 seamless sacks, 20c. each		40 00
		1,079 60

On the back of which were written the following words, to which was attached the signature of the plaintiff, A. W. Darling, and a written receipt on the back thereof as follows, to wit:

MARCH 8, 1882.

In consideration of one thousand and seventy-nine dollars
79 and sixty cents, the payment of which I hereby acknowledge, I, A. W. Darling, do hereby sell, assign, transfer, and convey all the within described and itemized articles and property, whose sum total is estimated at $1,079.60, and all and every my right, title, and interest therein to Elias Block, for him to have and hold forever. It is, however, agreed and stipulated by me that the written statement as to quantities shall be subject to all correction for errors, whenever written, four months from date hereof, and of said quantities shall be found in excess of the actual quantity and

which case or cases I shall make the deduction and account to Elias Block for said erroneous estimated and for him therefore at said prices.

A. W. DARLING.

And a certain check of defendants, endorsed by plaintiff, but immediately returned to defendants without being cashed; which said check is as follows, to wit:

Elias Block & Sons.

No. 6054. CINCINNATI, *March* 8, 1882.

Seasongood, Sons & Co., bankers:

Pay to the order of A. W. Darling ten hundred and seventy-nine $\frac{60}{100}$ dollars.

$1,079.60. ELIAS BLOCK AND SONS.

80 And oral testimony on behalf of plaintiff that the prices of the personalty included in said bill of sale were simultaneously or previously agreed as in plaintiff's pleadings set forth instead of as set forth in said bill of sale.

And conceded receipts and drafts and orders of plaintiff paid by defendant as follows, to wit:

$392.20. CINCINNATI, —— 13, 1882.

At sight pay to the order of 2nd National Bank three hundred and ninety-two & $\frac{20}{100}$ dollars, value received, and charge the same to account of—

F. A. SCHMIDT.

To A. W. Darling, Esq., Carrollton, Ky.

Endorsed across the face as follows:

"Accepted Feb. 15th, 1882.

A. W. DARLING.

Endorsed across the back as follows:

Pay R. S. Schmidt, Esq., cashier, or order, for coll., acc't of Second National Bank, Cincinnati, O.

Pay to 1st National Bank of Carrollton, Ky., cashier, or order, for collection, acc't of First National Bank of Louisville, Ky.

For value received I hereby transfer to Louis T. Block.

F. A. SCHMIDT.

81 With protest as follows:

$392.20. CINCINNATI, *Feb'y* 13, 1882.

At sight pay to the order of 2nd Nat. Bank three hundred and ninety-two $\frac{20}{100}$ dollars, value received, and charge the — to account of—

No. —. F. A. SCHMIDT.

To A. W. Darling, Esq., Carrollton, Ky.

Endorsed.

"Pay A. L. Schmidt, Esq., cashier, or order, for collection, acc't of Second National Bank, Cincinnati, O.

W. S. ROWE, *Cashier.*

Pay 1st Nat. Bank of Carrollton, Ky., cashier, or order, for collection, account First National Bank of Louisville, Ky.

A. L. SCHMIDT, *Cashier.*

COMMONWEALTH OF KENTUCKY, *Carroll County,* } *sct:*

On this 18th day of February, in the year of our Lord one thousand eight hundred and eighty-two, I, J. A. Donaldson, a notary public by legal authority admitted and sworn and residing in the county aforesaid, at the request of J. E. Barnett, cashier of the First National Bank of Carrollton, went with the original acceptance, of which the above is a true copy, to A. W. Darling, and demanded payment thereof, when he refused to pay it, saying he would see Mr. Schmidt next Monday.

82 Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest, against the drawer, endorser, and all others concerned therein for exchange, re-exchange, and all costs, charges, damages, and interest suffered and sustained or to be suffered and sustained by reason or in consequence of the non-payment of said acceptance.

Thus done and protested in the county aforesaid and my notarial seal affixed the day and year last written, the same being duly recorded in my office, as is by the law required. [SEAL.]

J. A. DONALDSON,
Notary Pub.

I have this day deposited at the Carrollton post office notices of the foregoing protest for all the parties thereto, enveloped in an envelope and addressed to W. S. Rowe, cashier, and F. A. Schmidt, Cincinnati, O., and A. F. Schmidt, cashier, Louisville, Ky.

J. A. DONALDSON,
Notary Public.

Protest fee	1 25
Notices	75
Postage	09
	$2 09

$300.00. CARROLLTON, KY., *July 18th,* 1882.

Pay to the order of W. C. Darling three hundred dollars, value received.

No. —. A. W. DARLING.

To E. T. Block, Cincinnati, Ohio.

83 Endorsed across the back as follows:

W. C. DARLING.

$500.00. CINCINNATI, *April 11th*, 1882.
Received of Louis T. Block five hundred dollars on ac't.
No. —. A. W. DARLING.

$300.00. CINCINNATI, *June* 21, 1882.
Received of L. T. Block three hundred dollars on acc't.
No. —. A. W. DARLING.

$1,000.00. CINCINNATI, *March 25th*, 1882.
Received of Louis T. Block one thousand dollars, to be credited to ac't of A. W. Darling.
No. —. H. SPILMAN & CO.

$125.00. CINCINNATI, *March 30th*, 1882.
Received of Elias Block & Sons one hundred and twenty-five dollars on ac't.
No. —. A. W. DARLING.

$200.00. CINCINNATI, *May* 29, 1882.
Received of Louis T. Block two hundred dollars.
No. —. A. W. DARLING.

84 $308.20. CINCINNATI, *March* 20, 1882.
Received of Louis T. Block three hundred and eight and $\frac{20}{100}$ dollars.
No. —. A. W. DARLING.

And testimony conducing to prove that plaintiff had himself used musty and rotten grain in manufacturing the whisky of 1881, in controversy.

And testimony conducing to show that plaintiff was unable to refund for said musty whisky returned to defendants.

And the testimony of Joseph Back that he had bought of defendants twenty-nine barrels of said whisky of the manufacture of 1881 and found the same musty and returned same to defendants and received credit for it on January 8th.

The foregoing was all the testimony introduced or offered bearing upon the exceptions to the charge of the court; and thereupon the court charged the jury as follows, to wit:

GENTLEMEN OF THE JURY:

You have t-o suits here to consider, that instituted by the plaintiff, who claims a balance of the purchase-money on the sale of the distillery, fixtures, and machinery, and he claims a balance — that sale of $5,636.

He claims some $1,500 or $1,700 on the sale of the personalty in addition as not having been paid. He admits a credit of $3,103 as having been paid. This is his claim on his branch of the suit.

85 The counter-claim set up by the defendant is a separate and distinct suit in the eye of the law, and he claims $9,000 as dam-

ages resulting to him from the injury to the trade-mark or the brand, as it is called, to the "Darling whiskey."

That injury, he claims, has resulted from the fact that he received musty whiskey under his contract with Darling, and that it has injured that trade-mark or brand to that extent; that is his claim. You must take up one at a time.

First, on the plaintiff's case:

All the papers, the contract of sale, the deed, and the other papers introduced by the plaintiff and defendant, show that there is or was a balance of $5,636 due the plaintiff on that sale of the real estate, the distillery, and fixtures. Those contracts introduced and the deed introduced do not, it is the duty of the court to instruct you, and the court does, and tells you they do not, include the personal property, but that the personal property — sold by a separate bill of sale and separate transaction, and you must determine from the evidence *of* the amount that personal property was *used* for.

86 The defendant sets up a receipt, with an itemized bill, showing that it was sold for $1,079.60. The plaintiff produces an itemized bill and says that the personality — sold separately from the reality, amounting to same $1,700, but the court makes it somewhere near $1,500. It is for you to determine from the evidence which is correct—what was the amount of personal property sold and for what price.

The defendant, as I have stated, produced this receipt of Mr. Darling's on the back of that itemized bill showing $1,079.60 as the price of that personality. That itemized bill is *prima facie* evidence of the correctness of the sale of the personal property, and the burden is on Mr. Darling to show clearly to your satisfaction that this is not correct. If he has satisfied you that the personal property amount*ing* to more than that you must give him what that personal property amounts to and in addition to the $5,636.

In respect to this check that accompanied that bill of sale of the personal property the proof discloses that that check was handed

87 to Mr. Darling at the time he receipted this bill for the personal property, and that he thereupon endorsed in blank and handed it back to a member of the firm, Mr. Lewis Block, from whom he received it; and the defendant now produces it, saying it has never been paid, and, in fact, it has not. If Mr. Darling turned it over to the man that drew it and the man handed it to him and he placed — back in his (Block'-) possession, that would not be a payment if he had said four thousand times on the back of that paper that he had received payment. As long as that check was returned to defendant that cannot be payment in the eye of the law, and is not a payment, so you have to start out now in the plaintiff's case with two items of accounts; $5,636 is one item of the real estate, the balance of the purchase-money; then you have to give the plaintiff a credit for the amount of the personal property that you may find from the evidence—the price of the personal property as you may find from evidence. The court told you this receipt on the back of this itemized account of that personalty is

prima facie evidence of its correctness; but if you allow
88 more than this $1,079.60 on the sale of the personalty you must do it on evidence that satisfies you of the incorrectness of this. If you find from the plaintiff's evidence that the defendants are to pay more for the personalty than the receipt here indicates on this check given for $1,079.60, you will allow him the excess. Then you come now to what has been paid by the defendant on that. You look at the evidence and ascertain how much has been paid. The plaintiff claims that there has been only $3,103 paid to him on that account, when the defendants claim, and introduce their book-keeper and books and statement of accounts to show, that they have been paid $3,945.35. The defendant produces an itemized bill showing the credit he claims. If you find those credits correct you are to allow him $3,945.35 as credited. In reference to the tax, if you find from the evidence of this tax being paid upon the whiskey that Darling was liable for it, of course he must be charged with payment of the tax. You look to the receipts and evidence upon that subject. $167.80 recites or purports to be
89 the tax report Jan. 24, 1883. That was for the sale by Darling to Block and Sons. Across the face—that is in red ink—"back taxes for 1880–'1. You must look to the evidence to see whether this is a tax charg-able to the plaintiff, Darling, or to the defendant or to some one else, or if charg-able to Whitehead, the firm, the owners of the property, or if it is not to be charged against Darling; you must determine this. The court cannot tell you how the fact is; you must determine. Whatever credits you do allow the defendants are to be deducted from two sums: $5,636, the balance on the realty, and whatever you find to be the prices of the personal property. For the plaintiff you add those two sums together, $5,636 and the amount of the personal property, and from that sum, say, due the plaintiff you deduct whatever credits you find the defendants have really paid. The balance is the amount due the plaintiff and on which you may in your discretion allow interest or not. Now, the defendant claims as counter-claim that he has been injured in respect to what is called the trade-mark or brand of this particular whiskey. There may be a property,
90 and a valuable property in what is called a "trade-mark" or "brand" by which it is sold in the market. This may be a valuable property, such as the name of a newspaper. Take that of the Cincinnati Enquirer, for instance. The material on hand, presses, type, and paper which they use in the daily business of issuing a daily paper would not amount to more than a few thousand dollars, but the name of that paper—what is called its "good will"—would be a very valuable property. It would sell for many thousand dollars more than the stock or material on hand. There is a special property, therefore, in what is called the name or good will of an establishment. The defendant, in his counter-claim, claims the good will has been seriously injured and damaged by a breach of the plaintiff's contract in selling to him musty whiskey when he had a contract to use sound grain and materials and to sell no whiskey that was musty. The proof introduced before you shows

that before the contract was entered into the defense had notice of musty whiskey being made and several items returned.
91 Now, the court instructs you that you gave no damages on account of the depreciation of the whiskey itself. This has been passed upon by the court heretofore. The value of the whiskey which he agreed to furnish and the whiskey which he did furnish is not to be considered by you for a moment, because the defendant did not undertake or offer to return the whiskey when he discovered its deficient character. It is in proof before you by Mr. Block, Sr., and by the plaintiff that the plaintiff offered as to all whiskey whatever in bonded warehouse that he offered to return and take back any musty whiskey. That is proved substantially by Block and Darling. The claim for damage is that that musty whiskey which Block received under his contract with Darling was sent out over the country and has injured his business—injured that particular brand of whiskey called the "Darling whiskey"—and interfering with his trade in that whiskey. This is his claim for damages. Now, there is but one other point. They state that *that* had several articles of that musty whiskey returned to them. They fail to show the dates at which it was
92 so returned; they fail to show the time it was returned. There is but one witness that defines a date of the musty whiskey; that is a witness by the name of Jos. Block. He says he purchased 29 barrels of the make of 1881 that had been distilled and manufactured by Mr. Darling and which he had purchased from Messrs. Block and & Sons; that he attempted to sell it and discovered it was musty and not salable. In early January, 1882, he returned it to Messrs. Block & Sons and they took the whiskey back. Now, that put Mr. Block and his sons on notice as to the character of that whiskey; they knew it was musty; therefore in respect to that one transaction they knew that there was musty whiskey in that property they were buying from Darling; they knew that before the purchase of the property and the trade-mark known as the Darling brand. Now, gentlemen, the court instructs you that if, with the knowledge of their being musty whiskey in this property purchased from Mr. Darling, brought to the notice and knowledge of them before they bought and made purchase of the good will or brand, as it is
93 called, which they did not purchase until the 8th of March, 1882—if they thereafter sent out that whiskey they had previous notice was musty, they cannot hold Darling responsible for any injury that might result to the good name of that whiskey. They purchased it with the knowledge that there was musty whiskey there; they cannot purchase the brand any good will, and then send out whiskey they had previously owned as to which they had notice that there was musty whiskey in the lot and claim damages for injury to brand when it was their own whiskey sent out and the brand specially purchased. And so the court instructs, as it is the duty of the court to do under the evidence in this case, made a rule by the Supreme Court of the United States, that when the plaintiff cannot succeed under the evidence that he introduces and if he should succeed it would be the duty of the court to set aside the verdict.

It is not my duty to tell you you ought to find a verdict for one or for the other. One thing in the way of defendants' across-action, it would be utterly impossible for I or for you to
94 estimate a damage if he was so entitled. The law required men to say the exact damages. The law would require it to be shown that the good will was inquired by an exact estimate of how many barrels — sold, how many barrels were musty and sold, and to claim damages otherwise would be physically impossible and you or I to estimate what was the extent of his damages. It is his duty to make it clear and satisfactory, so under ruling of the United States Supreme Court requires this court to tell you whether the case can succeed or not. It is the duty of this court to tell you that the defendant has not made out any case for damages.

You will therefore retire to consider the verdict and return what you find to be the balance due to the plaintiff, allowing him interest or not as you may see proper.

The defendants excepted to all and each part of the foregoing charge and instructions, and same was all the charge or instructions given by the court; and thereupon the jury returned their verdict as follows, to wit:

95 A. W. DARLING
vs.
ELIAS BLOCK & SONS.

This day came again the plaintiff in person and by attorneys, came again the defendant in person and by attorneys, and came also again the following jury, to wit:

Joseph McClintock, F. E. Earl, Robert Hemingray, Jos. Rich, Jr., J. L. Brink, D. W. Muncy, Ed. Brown, Owen Gains, Thos. J. Crouch, Philip Senior, R. S. Richardson, & Robert Rucker.

The jury heard the evidence and arguments of counsel, and were by the court instructed in the law of the case, and thereupon retired to their room to consider the case. Presently returning into the court, they presented the following verdict, viz:

"We, the jury, find for the plaintiff in the sum of thirty-nine hundred thirty-eight and $\frac{40}{100}$ (3,938^{40}) dollars, with legal interest from Ma-ch 11th, 1882.

F. E. EARL, *Foreman.*"

And thereupon the court rendered its judgment as follows:

It is therefore considered by the court that plaintiff have and recover of defendants the sum of thirty-nine hundred and
96 thirty-eight and $\frac{40}{100}$ dollars ($3,938$\frac{40}{100}$), with interest thereon, at the rate of six per centum per annum, from the 11th day of March, 1882, until paid, and their costs herein expended, to be taxed, *per* all of which they may have execution.

And thereupon the defendants filed their grounds and moved the court for a new trial; which motion was, by the court, overruled; to which ruling the defendants excepted and still except; and thereupon the defendants, on their motion, were granted until the 17 day

of January, 1887, to tender a bill of exceptions; and thereupon, on said day, the defendants tendered this their bill of exceptions and move that the same be signed, sealed, and made part of the record.

And the court, on said motion, took time, and, on the 19th day of May, 1887, the same is signed, sealed, and made part of the record.

HOWELL E. JACKSON,
Circuit Judge.

And on a day following, to wit, on the 20th day of June, the following bond was filed herein, viz:

United States Circuit Court, District of Kentucky.

97 ANDREW W. DARLING, Plaintiff, *vs.* ELIAS BLOCK & SONS, Defendants. } Bond.

Know all men by these presents that we, Elias Block & Sons, principal, and J. W. Freiberg, surety, are held and firmly bound unto Andrew W. Darling, the plaintiff herein, in the sum of fifteen thousand ($15,000) dollars, to be paid to the said Andrew W. Darling, his assigns, executors, or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 6th day of June, A. D. 1887.

Whereas the above-named Elias Block and Sons have prosecuted a writ of error to the Supreme Court of the United States to *reserve* the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Covington:

Now, therefore, the consideration of this obligation is such that if the above-named Elias Block & Sons shall prosecute their said writ of errors to effect and answer all damages and costs if they shall
98 fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ELIAS BLOCK & SONS.
J. W. FREIBERG.

Approved June 11, 1887.
HOWELL E. JACKSON,
Circuit Judge.

UNITED STATES OF AMERICA, *District of Kentucky,* } *ss:*

I, Joseph C. Finnell, clerk of the United States circuit court for the sixth circuit, district of Kentucky, do hereby certify that the foregoing ninety-eight pages (this included) contain a true and correct transcript of the record and proceeding in the case wherein Andrew W. Darling is plaintiff and Elias Block and Sons are defendants, as appears from the files and records of my office.

Seal 6th Circuit Court, Ky. Dis., U. S. of America.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Covington, this 18th day of July, A. D. 1887.

JOS. C. FINNELL,
Clerk U. S. Circuit Court, Ky. Dist.

Endorsed on cover: Kentucky C. C. U. S. No. 299. Elias Block & Sons, plaintiffs in error, *vs.* Andrew W. Darling. Filed November 19, 1887.

Office Supreme Court U. S.
FILED.
APR 13 1891
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

October Term, 1890.

ELIAS BLOCK & SONS,

PLAINTIFFS IN ERROR,

vs.

ANDREW W. DARLING,

DEFENDANT IN ERROR.

No. 299.

BRIEF FOR PLAINTIFFS IN ERROR.

T. F. HALLAM,

Attorney.

Seal 6th Circuit Court, Ky. Dis., U. S. of America.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Covington, this 18th day of July, A. D. 1887.

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Plaintiffs in Error,
vs.
ANDREW W. DARLING,
Defendant in Error.
} No. 299.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

The defendant in error sued, July 22, 1884, in the state court, to recover $5,636, money deposited with with plaintiffs in error, to be repaid on order, and $1,508.37, the price of certain personalty set out in a bill of particulars, all subject to credits amounting to $3,103.

The cause was removed to the U. S. Circuit Court for Kentucky, and, after sundry pleadings, issue was joined, as follows:

1st. There were credits greater than $3,103;

2d. The alleged deposit was with fraudulent intent to cheat creditors;

3d. That all was part of a single transaction, wherein defendant in error had sold to plaintiffs in error a distillery, with brands, good-will, &c., and had represented and warranted that the product was of good reputation and was not musty in fact, nor regarded or known as musty: that this good reputation was a material inducement to the trade, but that the product in fact was musty and so reputed to be, and the purchase was therefore, worth $9,000 less than the contract price, for which sum, as a counter-claim, the plaintiffs in error prayed judgment over.

There was a jury trial and verdict and judgment, December 22, 1886, for defendant in error for $3,938.40, with interest from March 11, 1882, the charge as to the counter-claim being peremptory against the plaintiffs in error. Motion and grounds for new trial were filed and overruled, and this writ of error taken.

The questions involved were all raised by exceptions during the trial, and renewed in the grounds for new trial.

Specification of Errors.

The errors complained of are, per force, all embraced in the grounds for new trial. For convenience of consideration the first four of these may be grouped in two heads, viz:

First. The judgment was excessive as to the principal awarded.

Second. And as to the interest;

For either excess the plaintiffs in error were entitled to a new trial.

Third. The fifth and tenth grounds for new trial are substantially one, in imputing error to the court in so

charging as to mislead the jury into finding excessive interest.

Fourth. The sixth, seventh, eighth and ninth relate to errors of the court, in so charging as to lead the jury into finding the excessive principal.

Fifth. The eleventh and twelfth allege error in charging the jury that a disputed fact in the case was proven against plaintifis in error.

Sixth. The thirteenth and fourteenth grounds allege error in charging that without proof of exact damages in amount, plaintiffs could recover nothing on their counter-claim for damages for misrepresentation, or breach of warranty, as to the good reputation of the trade-mark or name, which they bought in connection with the distillery of defendant in error and its product and business.

Seventh. The fifteenth imputes error in admitting in evidence alleged letters of plaintiffs in error, without other proof of their authenticity than the fact that defendant in error had received them by mail.

Eighth. The sixteenth (last) ground alleges error in rejecting testimony that a deposit, which defendant in error sought to recover, was made in fraud of his creditors.

Argument.

To make these assignments more specific:

First. The original complaint (p. 3.) is upon a claim of $7,144.37, subject to a credit therein conceded of $3,103, not then itemized, but afterward itemized in a reply (p. 26). On the trial the plaintiffs in error introduced "conceded receipts and drafts and orders of plaintiff, (below) paid by defendant" (below) which aggregate $3,127.49, and do not embrace $878 of the

items already pleaded against himself by the plaintiff below.

To make this as plain as blackboard could, we present parallel tables, the one on the left being the credits admitted in the pleading, the other being those "conceded" in testimony, somewhat changing the order in which the latter appear on the record, (p. 40.) in order that identical sums may appear opposite each other.

$ 20.	to Plaintiff.		
308.	for Schwill.		
125.	to Plaintiff - -	$ 125.	
1000.	" H. Spilman - -	1000.	
500.	" Plaintiff - -	500.	
550.	" W. C. Darling.		
300.	" Plaintiff - - -	300.	
300.	" W. C. Darling -	300.	
392.20	F. A. Schmidt.		
	Protest.	2.09	
	Plaintiff (p. 42.)	200.00	
	" "	308.20	

By adding to either column the items omitted in it, but embraced in the other, it is clear that defendant in error conceded $4,005.49 credit. Hence the verdict and judgment for the principal sum should in no event have been more than $3,138.88 instead of $3,938.40.

Being for $799.52 more than the complaining party sought, after deducting the credits he confessed, the verdict was that unusual thing "contrary to law."

Second. It is equally clearly contrary to law as to the interest, and its excess is still more gross in that regard.

The complaint, construed solely in favor of its pleader, is, in its largest item, for "money deposited," and only to be "paid to plaintiff on his order." But al-

legation is wholly wanting as to any "order" or demand. The cause of action was not ripe as to that deposit when suit was brought, and, even treating the bringing of suit as an "order" on that deposit, it is inconceivable how judgment could have gone, even by default, for two and a third years interest prior to that time; yet the judgment is for interest "from the 11th day of March, 1882," though the suit was not filed till July 22, 1884.

The money for the other items was also returned to remain on deposit in like manner, (p. 40.) and the same law applies also to it. The total unwarranted interest thus adjudged is slightly over $1,000, if the principal claimed were correct.

The declaration did not ask interest back of its filing; it simply prays for the balance of principal "with interest," and it cannot be construed to mean any other than future interest.

Third. The court submitted to the jury the *law* as to when the interest should begin under this state of pleading, saying, (p. 44.) "you may in your discretion allow interest or not," and (p. 46.) "allowing him interest or not, as you may see proper"—in neither instance limiting them as to how far back they might calculate.

The jury availed themselves of this large liberty, and allowed interest from March 11, 1882, possibly with some eccentric financial notion that deposits ought to bear interest, but that there ought to be three days of grace after deposit made, before interest should run.

I can conceive of no other theory for the date of March 11.

Fourth. The court wholly departed from the pleading in charging that the plaintiff below, "claims a balance

of the purchase-money on the sale of the distillery, fixtures and machinery, and he claims a balance—that sale, of $5,636." Throughout the charge this is reiterated, when in fact the claim was on a deposit of that much money. This sum, the court said, must be allowed, and "you must give him what that personal property amounts to and in addition to the $5,636." Moreover it is charged that "these contracts introduced and the deeds introduced, do not include the personal property," yet the contract of sale (p. 37.) expressly includes with the realty, machinery etc., "the distillery business and all and every the property and rights connected with and incident and belonging to the same.

The court further charged that the plaintiff below says, "that the personalty sold separately from the realty, amounting to some $1,700," (though the exact amount claimed for it was $1,508.37,) and then adds, "but the court makes it somewhere near $1500."

The items composing the bill of sale, as exhibited in the paper with the declaration, are precisely the same as those in the original paper (p. 39), the difference is in the prices. The original paper was signed by the plaintiff below contemporaneously with its execution, and the only provision for any variation then made was that "the written statement as to *quantities* shall be subject to all correction for errors, whenever written, four months from the date hereof," but the "said *prices*" were to remain fixed.

It is true that there was oral testimony (p. 40) that the prices were simultaneously "or *previously* agreed as in plaintiff's pleadings set forth instead of as set forth in said bill of sale." If "previously" agreed, of course the previous agreement was superseded at the actual conclusion of the transaction, and the alternative is al-

ways against him who speaks for himself in the alternative.

But in pleading (p. 15) the plaintiff below says, "the values thereof and the prices to be paid therefor was not ascertained and agreed upon until afterwards"—an allegation contradicted by the writing and not attempted to be sustained by any species of testimony.

The instruction should have been peremptory for defendant below on that point, but was practically peremptory for the other side; that is to say, the Court said (p. 44) "if you find from the *plaintiff's* evidence that the defendants are to pay more for the personalty than the receipt here indicates on this check given for $1,079.60, you will allow him the excess."

These errors of judge and jury added yet $400 more to the wrongful principal and $50 to the premature interest.

Fifth. The issues are strong and distinct as to whether plaintiffs in error knew of the mustiness of the whisky, which had been sent out and was affecting the value of the "Darling" brand. That the whisky was musty is proven without contradiction; and there was testimony conducing to prove that this could not have been discovered by or known to any one but the manufacturer before the distillery sale (p. 34–5)—and there was a written warranty that said whisky should be "same as heretofore made" and "not musty," (p. 35).

The trial court charged that if the plaintiffs in error, when they purchased, knew there was musty whisky at large, infecting the reputation of the brand, they could not hold the defendant in error responsible—which is sound as abstract law, but touches no pleading in this case, nor any testimony. But that error was slight

compared with the error of saying (p. 45) "They purchased it with the knowledge that there was musty whisky there;" "they knew that there was musty whisky in that property they were buying from Darling." In refering to the testimony of a witness whom the court calls "Jos. Block," but who we must suppose to have been Joseph Back (p. 42), who bought (he does not say when) some of the whisky made in 1881, the court said: "In early January, 1882, he returned it to Messrs. Block & Sons., and they took the whisky back. Now that put Mr. Block and his sons on notice as to the character of that whisky; they knew it was musty."

This was a signal error as to Back's testimony. His testimony is, simply, that he "found the same musty and returned same to defendants and received credit for it on January 8th,"—and not one word as to the year.

It may be argued that the mention of "the manufacture of 1881" justifies a deduction or inference that the return of it on "January 8th" meant January 8, 1882. Possibly so—for a jury, but not for a court. But in the case of whisky it would be a strained inference for a jury, whisky being almost never taken out of bond and put on sale at less than a year old. Besides, in this case there was testimony, uncontradicted, that mustiness could not be detected "until said whisky was a summer old."

Doubtless the witness said "January 8th" just as he might have said "4th of July" or "Christmas;" the court supplied the year and arrested inference from the jury.

Sixth. There was testimony, not objected to nor rebutted, that the value of the purchase was impaired $10,450 by the evil reputation given by Darling to

his brand just before the sale and not yet developed. The court took this, also, wholly from the jury, saying:—

"One thing in the way of defendant's cross action, it would be utterly impossible for I or you to estimate a damage if he was so entitled. The law required men to say the exact damages. The law would require it to be shown that the good will was injured by an exact estimate of how many barrels—sold, how many barrels were musty and sold, and to claim damages otherwise would be physically impossible, and you or I to estimate what was the extent of his damages. It is his duty to make it clear and satisfactory, so under ruling of the United States Supreme Court requires this court to tell you whether the case can succeed or not. It is the duty of this court to tell you that the defendant has not made out any case for damages."

We respectfully submit that, that is not the law on the subject of sale of good-will, trade-mark, established reputation or business. If it were, character in business would be of no value.

The return of commodity does not heal damaged reputation; it only places back in the hands of him who has done the injury, the power to duplicate it by sending the same unwholesome goods abroad again.

It may be, that on such second venture the goods might not return; but it might also be that the purchaser would say, "I do not know what is the matter with it, but I want no more of that brand, or of that man's wares who deals in that sort."

Seventh. This assignment may be left as first stated.

Eighth. It is difficult to perceive any distinction in principle or in authority between putting the title to realty out of one's hands to defraud creditors and the

putting out of one's hands his personalty or money with the same provident object.

Finally. It may be objected that the exception to the charge is too broad in excepting to "all and each part." But it is certified that this was done and undoubtedly a litigant has the right to except to every sentence in a charge, whether in the disorderly style of continual interruption or in the more seemly of having it understood and allowed that each portion as it is brought to bear on each feature of the case is excepted to.

We submit that no part of the charge is sound in its bearing on that feature of the case which it is designed to provide for.

And if there were any health in it, there is yet error in suffering that excessive verdict to stand.

T. F. HALLAM,
For Plaintiff in Error.

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Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States

October Term, 1890.

ELIAS BLOCK & SONS,

PLAINTIFFS IN ERROR,

vs.

ANDREW W. DARLING,

DEFENDANT IN ERROR.

No. 299.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

ORRIN B. HALLAM,

Attorney.

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BRIEF FOR DEFENDANT IN ERROR.

MOTION TO DISMISS OR AFFIRM.

The judgment appealed from was rendered December 22, 1886, for $3,938.40, with interest at 6 per cent. from March 11, 1882; the interest to the date of judgment amounted to $1,123.67 which made the amount of the judgment $5,062.07, but the defendant in error, with the tacit assent of the plaintiffs in error, they "being present by counsel and not objecting," (Tr., p. 30) remitted $100 of this judgment, so that the "matter in dispute" was thereby reduced below $5,000; and this

court has no jurisdiction of the writ of error, unless it considers as part of the matter in dispute the $9,000 counter-claim. The jurisdiction depending on this counter-claim, there is presented to the court in support of it, and in support of the position that the court below erred in peremptorily taking it from the jury, only a recital that the defendant Elias Block "gave" testimony: "conducing to prove that the tangible property was not of greater value than $10,000, without the good reputation of the A. W. Darling brand of whisky, and that the said alleged good reputation was a material inducement to said purchase, and that same was impaired and destroyed by the using of musty and rotten grain"—(p. 34).

This testimony, in the form it is stated in the bill of exceptions, appears to have been testimony given only by a single witness, and he the senior member of the complaining firm; and was preceded and followed by uncontradicted testimony that the whisky was made principally from grain furnished by the plaintiffs in error, and that they had never offered to return any musty whisky. Under these circumstances the question seems to be one of that class denominated by this court in Rule 6, Section 5, as "so frivolous as not to need further argument" and the defendant in error entitled to an affirmance under that section.

Argument.

But, if the court should be of the opinion that it has jurisdiction, and that the counter-claim is entitled to serious consideration, the following suggestions are submitted on behalf of defendant in error, in response to the specification of errors filed by his adversary.

The first and second specifications are that (not the verdict, but) the judgment is excessive. To meet this as to the principal it is sufficient to say that this court will not, since the judgment follows precisely the verdict, go into an investigation of the evidence to ascertain whether it was too much or too little.

"With the charge of the court to the jury upon mere matters of fact, and with its commentaries upon the weight of evidence, this court has nothing to do."

Carver *vs.* Jackson, 4 Pet., 1.

"Courts of error have nothing to do with the verdict of the jury, except to ascertain, if they can, whether improper evidence was admitted to the jury, or whether the jury was misdirected by the presiding judge."

First Unitarian Soc. *vs.* Faulkner *et al.*, 91 U. S. 415.

And as to the interest, there was no motion in the court below to correct the error, if any, in that particular. I take issue with opposing counsel's proposition that the plaintiff's prayer for interest, "cannot be construed to mean any other than future interest." The account, filed as part of his petition, bore date in 1882, and a reasonable construction of his prayer would be that he wanted interest from such time, in that year, as the proof showed the account to have matured. Surely any lack of formality or certainty was cured by the verdict. If it were otherwise, and the interest began at an earlier date than authorized by the record, it was a mere clerical misprision, which cannot be reviewed until motion (not for a new trial, but) to amend the judgment is made and denied. "A misprision of the clerk shall not be ground for an appeal, until the same shall have been presented to and acted upon in the

circuit court," *Kentucky Civil Code of Practice*, Section 516.

It is a clerical misprision to render judgment for too much interest or for matters not claimed in the petition.

Wilson *vs.* Barnes, 13 B. M., (Ky.) 332.
Clark *vs.* Finnell, 16 *Id.*, 334.
Johnson *vs.* Bank of Ky., 2 Duv., (Ky.) 521.

Besides, the plaintiffs in error's claim that the principal part of the defendant in error's claim was a "deposit," and not subject to interest until after a demand, is not a sound one. It is true that the original petition took that ground, but the subsequent pleadings took a very wide range, and, taken together, clearly show that it was really a balance of purchase money; and the defendant in error's reply to the amended answer and counter-claim (p. 25) is in the nature of a common law new assignment, and alleges that the $5,636 was retained as an advance payment for "slop" to be furnished him, for cattle feed, by plaintiffs in error, which they refused afterwards to furnish; showing which, he was undoubtedly entitled to recover his money, with interest from the date of the original transaction.

The third specification is that the court erred, in its charge to the jury that they might allow interest in their discretion. This, if erroneous at all, was rather more favorable to the debtors than the law allows. The contracts show that the transaction was a cash one. "When it is certain that money ought now to be paid, and ought to have been paid long since, the law, in general, implies *conclusively* that, for the delay in the payment of the money, the debtor promised to pay legal interest.". 3 *Parsons on Contracts*, 102.

"For goods sold for cash, interest begins from the date of the delivering of the goods. *Ibid*, 103.

There is also an unwritten rule, sometimes followed and well sanctioned by precedent, that in matters of account the allowing of interest is discretionary with the deciding tribunal, in view of all the facts. The plaintiffs in error cannot complain that they were given the benefit of this rule.

But it may be as well at this point to insist, as I do, that the exceptions to the court's charge are not sufficient to bring before this court for review, this or any other portion of the charge.

This court's rule on that subject, established for more than a generation, is that no general exception to the whole of such charge shall be allowed. "But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court." The only exception to the charge is found on page 46 of the printed transcript. "The defendants excepted to all and each part of the foregoing charge and instructions," and it is substantially admitted by plaintiffs in error, that this exception was stated in that form at the conclusion of the charge. It is a mathematical axiom that the whole is equal to the sum of all its parts. There can be no conflict between true sciences; law and mathematics must harmonize; and, therefore, an exception to all and each part is no more than a general exception to all; there is no attempt to state distinctly, or even generally, the several matters of law excepted to.

"The exception should be strictly confined to a misstatement of law, and, by being made known at the moment, would often enable the court to correct an

erroneous expression so as to explain or qualify it &c,."

Carver *vs.* Jackson, *supra.*
Ex parte Crane, 5 Pet., 190.
Stimpson *vs.* Westchester R. R., 3 How., 553.

"When the charge of the judge to the jury is of a character to mislead the jury, the error is one of law, and may be corrected by an appellate court; but in every such case the part of the charge to which the exception is addressed ought to be distinctly pointed out; unless that be done, the exception cannot be sustained as a ground for reversing the judgment, as that can only be done for error of law."

Railroad Co. *vs.* Varnell, 98 U. S., 485.

In First Unitarian Soc. *vs.* Faulkner *et al, supra*, it was held that an exception, addressed to nearly a page of the remarks of the judge, without any attempt to specify any particular paragraph or passage as the subject of complaint, was not sufficient, and that instructions are not to be regarded as the subject of error, on account of omissions not pointed out by the excepting party.

The fourth specification includes four errors in the charge, alleged in the 6th, 7th, 8th and 9th grounds for new trial. Of these, the 6th complains of the court's describing the $5,636 as a balance due on the sale of the real estate, distillery, fixtures, &c. As I have shown before, this seems to have been the exact fact, whatever device may have been agreed on to change appearances. In truth it is only claimed in that regard, by plaintiffs in error, that there was a nominal paying over and immediate return of the money; as to the 7th ground it is sufficient to say that the words, "the dis-

tillery business, and all and every the property and rights connected with and incident and belonging to the same," are entirely too vague to carry with it the mules, carts, sacks, coal, &c.; especially when coupled with a description of said property and rights as good-will, brands, trade-marks, &c, and an admission by the plaintiffs in error that they claimed the personalty, not under the deed, but under a separate bill of sale.

In the 8th ground it is complained that the court told the jury that it (the court,) made the amount of the personalty near $1,500. I do not so construe the court's charge on that point. Its exact language (p. 43) is, "The defendant sets up a receipt, with an itemized bill, showing that it was sold for $1,079.60. The plaintiff produces an itemized bill and says that the personalty sold separately from the realty amounting to some $1,700, but the court makes it somewhere near $1,500. It is for you to determine from the evidence," &c. Due allowances should be made for mistakes by stenographers, transcribers and printers, but is evident that the court only meant that the plaintiff's itemized bill, it made somewhere near $1,500; the pleaded amount by items being $1,508.37. The court cannot reasonably be considered to have told the jury that it found a certain fact or amount to be true, but that it was the province of the jury to find otherwise.

The ninth ground for new trial, with the argument on that branch of the 4th specification of error, substantially complains that the court restricted the jury to the consideration of "plaintiff's evidence" in determining whether the defendants were to pay more than the prices stipulated; this would seem to be an error too gross even to be committed by a justice of the peace.

But an inspection of the bill of exceptions shows that the defendants introduced no evidence, on this point, but the bill of sale; and that the plaintiff introduced evidence conducing to show that the prices were different; and, thereupon, the court very properly told the jury that the bill of sale and accompanying receipt made a *prima facie* case against the plaintiff, and that they must so find, unless by evidence in his behalf, which was the only evidence *aliunde*, he showed that this did not set forth the true contract or prices.

The fifth specification is immaterial, though the part of the charge therein complained of tallies substantially with the evidence. It was merely explanatory of the reasons the court had for taking the counter-claim away from the jury, and the two items of evidence complained of never went to the jury at all, but the branches fell with the tree.

And the same may be said of the sixth specification. It may be added, however, that what the court said as to "exact damages" is not to be construed as meaning the exact amount, but the exact manner in which the purchasers were injured; as, for instance, by a falling off of trade.

And, further, that the defendant in error, in his last pleading (p. 25-6), explicitly denied that he made any representation or warranty, either as to the character or reputation of his whisky, and there is no proof "conducing to show" that he did, either in his deed or elsewhere. The proof on behalf of plaintiffs in error, as we have seen, conduced only to show that the good reputation existed, and if impaired, it was their own fault. Like the Irish emigrant who left home with a

good character, but lost it on the ship, these parties seem to have bought a good reputation, and lost it as a result of there own furnishing of musty grain.

The seventh specification, the counsel for plaintiffs in error declines to argue—and with credit to himself. The bill of exceptions shows that the letters, while not very material, were received "from defendants," which sufficiently establishes their genuineness.

In the eighth, it is contended that the court should have admitted offered evidence to show that the $5,636 was left on deposit so as to defraud creditors. In a case like this such evidence was not competent, for the record shows that it was really a balance of purchase money and not a deposit at all. It may be that an original transfer of personalty or money, as well as realty, for such purpose, would leave neither party in a condition to enforce any claim against the other; but, if so, that proposition follows the action at every stage, and neither party would be entitled to a reversal any more than to original relief.

And, as to these last two specifications, it seems proper to add that Section 335 of the Kentucky Civil Code requires; "If the exception be to a decision admitting or excluding testimony, so much of the evidence as is necessary to explain the exception shall be stated." This must appear from the bill itself, and in this case it does not. It only shows (p. 42), "The foregoing testimony was all the testimony introduced or offered, bearing upon the exceptions to the charge of the court"—not upon the decision admitting or excluding testimony.